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**UNITY OF COMMAND FOR FEDERAL
CONSEQUENCE MANAGEMENT**

by

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September 2013

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UNITY OF COMMAND FOR FEDERAL CONSEQUENCE MANAGEMENT

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ABSTRACT

The United States eventually will face an existential catastrophe. An “existential catastrophe” would result in cascading effects extending well beyond the physical boundaries of the event. When studying the federal response to major disasters, it is apparent higher levels of presidential interest provide a positive impact on results. The lack of coordination of federal response efforts and the inability of the president to impose his will to marshal fully federal resources effectively were major problems identified after Hurricanes Katrina and Andrew. The inability of the federal government to coordinate the federal response efficiently to a catastrophe appears throughout 60 years of modern federal disaster response.

This thesis argues the most efficient way for the president to supervise the federal response to an existential catastrophe is to delegate authority for operational decisions to a single federal official that would allow the president and his cabinet to focus on strategic decisions. The Federal Emergency Management Agency Administrator, who would be supported by an empowered Emergency Support Function Leadership Group, with authority to direct all agency capabilities released to them by the president and their agencies, would lead the portion of the federal operational response formerly known as consequence management.

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LIST OF ACRONYMS AND ABBREVIATIONS

AFO	Area Field Offices
CBP	Customs and Border Patrol
CDR	Commander
CDRG	Catastrophic Disaster Response Group
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CENTCOM	U.S. Central Command
CFR	Code of federal Regulations
CIA	Catastrophic Incident Annex
CIS	Catastrophic Incident Supplement
CRS	Congressional Resource Service
DC	Distribution Center
DEC	Director's Emergency Council
DFA	Direct Federal Assistance
DHS	Department of Homeland Security
DoD	Department of Defense
DOJ	Department of Justice
DP	Displaced Person
DPC	Domestic Policy Council
DRA	Disaster Relief Act
DREAA	Disaster Relief and Emergency Assistance Amendments of 1988
DRF	Disaster Relief Fund
DRG	Domestic Resilience Group
DRM	Disaster Recovery Manager
EO	Executive Order
ERT	Emergency Response Teams
ESF	Emergency Support Function
ESFLG	Emergency Support Function Leadership Group
EST	Emergency Support Teams
FBI	Federal Bureau of Investigation
FCO	Federal Coordinating Officer
FDAA	Federal Disaster Assistance Administration
FDRC	Federal Disaster Recovery Coordinator
FEMA	Federal Emergency Management Agency
FIOP-R	Federal Interagency Operational Plan-Response
FOS	Federal Operational Support
FPS	Federal Protective Service

FRP	Federal Response Plan
FRERP	Federal Radiological Emergency Response Plan
GAO	General Accountability Office
HHF	Housing and Home Finance Agency
HHS	Department of Health and Human Services
HSA	Homeland Security Act
HSC	Homeland Security Council
HSOC	Homeland Security Operational Center
HSPD	Homeland Security Presidential Directive
HUD	Department of Housing and Urban Development
IAPG	Incident Action Planning Guide
ICE	Immigration and Custom Enforcement
ICS	Incident Command System
IECS	Integrated Emergency Coordination Structure
IEMS	Integrated Emergency Management System Concept
IG	Inspector General
IIMG	Interagency Incident Management Group
IMAT	Incident Management Assistance Team
IMH	Incident Management Handbook
IND	Improvised Nuclear Device
IPC	Interagency Policy Committee
JFO	Joint Field Office
JIC	Joint Information Center
JP	Joint Publication
JTF-Katrina	Joint Task Force-Katrina
LFA	Lead Federal Agency
LOHSEP	Louisiana Office of Homeland Security and Emergency Preparedness
MA	Mission Assignment
MACS	Multiagency Coordination System
MERS	Mobile Emergency Response Support
MOM	Maximum of Maximums
NAPA	National Academy of Public Administration
NCP	National Contingency Plan
NCS	National Communication System
NDRF	National Disaster Recovery Framework
NERS	National Emergency Response Structure
NGO	Nongovernmental Organization

NIIMS	National Interagency Incident Management System
NIMS	National Incident Management System
NLE	National Level Exercise
NOC	National Operations Center
NORAD	North American Aerospace Defense Command
NPG	National Preparedness Goal
NPS	National Preparedness System
NRC	Nuclear Regulatory Commission
NRCC	National Response Coordination Center
NRF	National Response Framework
NRP	National Response Plan
NSC	National Security Council
NSEC	National System for Emergency Coordination
NSS	National Security Staff
NSSE	National Security Special Event
OCDM	Office of Civil and Defense Administration
OEP	Office of Emergency Preparedness/Office of Emergency Planning
OOCP	Office of Operations Coordination and Planning
OPM	Office of Personnel Management
PACOM	United States Pacific Command
PDD	Presidential Decision Directive
PFO	Principal Federal Official
PKEMRA	Post-Katrina Emergency Management Reform Act
POW	Prisoner of War
PPD	Presidential Policy Directive
PSMA	Pre-Scripted Mission Assignment
RRCC	Regional Response Coordination Center
SAR	Search and Rescue
SCO	State Coordinating Officer
SES	Senior Executive Service
SFLEO	Senior Federal Law Enforcement Officer
SHAEF	Supreme Command Allied Expeditionary Force
SNRA	Strategic National Risk Assessment
SOP	Standard Operating Procedure
TA	Technical Assistance
TFT	Temporary Full-Time
TOPOFF	Top Official

U.S.	United States
UACG	Unified Area Command Group
UCG	Unified Coordination Group
US&R	Urban Search and Rescue
USACE	U.S. Army Corps of Engineers
USCG	United States Coast Guard
USFS	United States Forest Service
USNORTHCOM	United States Northern Command
VTC	Video Teleconference
WMD	Weapons of Mass Destruction

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cannot count the lives she has saved, or given back, to those who deserve it the most. She is a treasure for our nation's defenders and her daily will to care sets a benchmark for humanness and kindness to others.

I. INTRODUCTION

A. THE PROBLEM SPACE

Since the United States (U.S.) declared its independence from Great Britain in 1776, it has been blessed to have avoided a true catastrophe. Since the British burned Washington in 1814, the nation has never again faced the serious threat of invasion. When the Soviet Union acquired nuclear weapons in 1949, the country managed to prevail in the Cold War and avoided mutually assured destruction. Even the terrorist attacks of 9/11, as horrific and shocking as they were, did not threaten the nation's survival.

Likewise, the United States has so far managed to avoid a major natural catastrophe. The New Madrid earthquakes of 1811 and 1812 occurred in a sparsely occupied area of the country. The Great Chicago Fire of 1871, the Charleston Earthquake of 1886, the San Francisco Earthquake of 1906, and Hurricane Katrina's impact on New Orleans in 2005 did not result in the abandonment of these cities. Nor did the deaths of 675,000 citizens during the Great Pandemic of 1918–1919 significantly alter the trajectory of the United States after its victory in World War I.¹ However, history has shown that the malevolent effects of nature or man cannot be held in abeyance forever. Whether it is the buried city of Pompei, the Bronze Age cataclysmic explosion of the Volcano Thera wiping out Mionian culture, the plagues and Black Death of the Middle Ages and near history, time is littered with cities and whole civilizations destroyed by nature. Likewise, mankind's penchant for developing ever deadlier ways to kill now creates the possibility mankind can wreak the kind of destruction once reserved for the gods. While the threat of nuclear war has subsided with the end of the Cold War, the proliferation of nuclear weapons, whether from North Korea, a coup-wracked Pakistan or a future nuclear armed Iran, seems to be increasing. Smuggling just a handful of nuclear weapons into the United States could inflict irreversible damage. Similarly, advances in science and biological engineering mean that persons with the right knowledge,

¹ United States Department of Health and Human Services, "The Great Pandemic, The United States in 1917–1919," *Flu.gov* (n.d), <http://www.flu.gov/pandemic/history/1918/>.

resources, and intent could unleash viruses that could devastate whole continents, if not the world. Even the embrace of technology means that events that caused little consternation for this country's forebears, such as the sun launched Carrington Super Flare of 1859, could grind the country to a halt.²

At some point, the United States will face an existential catastrophe.³ It will quickly overwhelm the resources of state and local governments, the private sector, volunteers, and individuals. The federal government will need to act effectively and decisively to coalesce the nation's capabilities and coordinate its efforts to ensure the broadest use of its resources. The president is uniquely situated, and in fact armed by the Constitution and Congress, to ensure the continuity of the nation and its states and territories. The federal government will need to be a focal point for situational awareness and a fulcrum for action. The president must be a beacon of confidence delivered through tangible displays of relief.

However, the federal government's record at responding to major disasters, much less catastrophes, is mixed at best.⁴ While it appears most Americans were satisfied with the recent federal response to Hurricane Sandy,⁵ it did not rise to the level of a catastrophe, which is the problem space this thesis seeks to explore; how to best organize, prepare, and deliver the federal response to an existential catastrophe.

The current federal response to disasters is based upon a foundation of diffused responsibility, which falls upon local government, governors, various federal agencies,

² Wikipedia, "Solar Storm of 1859" (n.d.), http://en.wikipedia.org/wiki/Solar_storm_of_1859.

³ "Existential catastrophe" is a new definition proposed for events of this magnitude and is discussed in further detail in Chapter I. An "existential catastrophe" would (1) directly affect at least one of the 11 U.S. mega-regions; (2) result in cascading events beyond a mega-region either unforeseen or unmanageable; and (3) create a direct threat to the immediate stability or long-term prospects of the nation.

⁴ See generally, Claire B. Rubin, ed., *Emergency Management: The American Experience 1900–2010* (CRC Press, Boca Raton, FL, 2012). Rising expectations by the American public may also contribute to this perception. Moreover, as Rutherford H. Platt notes in *Disasters and Democracy*, the process of federalizing disasters has changed the public's perspective from compassion to entitlement...). Rutherford H. Platt, *Disasters and Democracy: The Politics of Extreme Natural Events* (Washington, DC: Island Press, 1999).

⁵ Rasmussen Reports, "36% Say Government Did Good Job Responding to Hurricane Sandy," Tuesday, January 8, 2013, http://www.rasmussenreports.com/public_content/politics/general_politics/january_2013/36_say_government_did_good_job_responding_to_hurricane_sandy.

the president, and for certain services, the private sector. It is a system premised on the idea of “bottom up,” in that local officials will attempt to respond to an incident, and if they need assistance, they will seek additional resources from the private sector, state and federal government. However, even when the event is damaging enough to result in a declaration under the Stafford Act by the president, diffused responsibility still exists. This makes sense between the states and federal government, given the powers reserved for the States under the Tenth Amendment to the Constitution, but diffused responsibility exists even within the Executive Branch. This shared responsibility in emergency response doctrine is referred to as “unity of effort.” Nevertheless, unity of effort may be hiding, if not exacerbating the lack of responsibility and supervision necessary to harness the full breadth of federal capabilities for an existential catastrophe.

While the United States has not suffered from an existential catastrophe, it has weathered multiple serious disasters in the last few decades, primarily hurricanes and flooding with a handful of earthquakes in California. The federal response for the most damaging events was often heavily criticized. However, on those occasions during which the president took a more aggressive role, the federal response seems to have been more efficient and more favorably received.⁶ As stated in the congressionally chartered National Academy of Public Administration report *Coping with Catastrophe*, “The relationship of emergency management to the president, or more broadly the institutional presidency, is crucial and has been so throughout history.” A line from a New York Times editorial put it bluntly: “The President gets the kind of FEMA he deserves.”⁷ For instance, once Frank Carlucci was sent to Pennsylvania to oversee federal relief efforts for Hurricane Agnes in Pennsylvania at the direct behest of President Nixon, the perception of the federal government became a net positive. This event, however, was probably the last gasp of the original federal disaster response organization, which for

⁶ “While there is no definitive answer as to the extent to which the president should be involved in emergency management functions, events have shown that when responses to catastrophic disasters involve decisions made by, or with the support of, the president, their outcomes tend to be superior to those of responses handled solely by administrative channels.” Keith Brea, “The Formative Years: 1950–1978,” in *Emergency Management: The American Experience 1900–2010*, ed. Claire B. Rubin (CRC Press, April 3, 2012).

⁷ Wamsley et al., *Coping With Catastrophe*, National Academy of Public Administration, February 1993, 21.

around 15 years had been run from the White House. Since President Nixon⁸ moved the coordination of federal disaster response from the White House, a consistent theme of a lack of direct presidential attention to disaster response has ensued.⁹

If the ability of the president to impose his will on the federal response to a disaster is so important, the question becomes whether a way might exist to improve presidential interest in a way that maximizes his involvement while recognizing the competing claims on his time and attentiveness? Does a way exist to make the president present in a disaster response without actually being present all the time? To answer this question, this thesis proposes the substitution of unity of command rather than unity of effort amongst the federal agencies not engaged in law enforcement activities or the Department of Defense (DoD) as a way to maximize presidential involvement in the federal response to an existential catastrophe.¹⁰ Given the breadth of decisions to be made, a choice was made to focus on the operational level of response, which as defined later in this thesis, is the highest level of federal government decision-making processes dedicated to a particular incident, in this case, an existential catastrophe.

B. LITERATURE REVIEW

When conducting a literature review on how to improve the federal response to an existential catastrophe, what is astonishing is how the same problems persist from one disaster to the next. It is striking to see how many of the lessons and problems identified after Hurricane Andrew by official government inquiries, such as those from the National

⁸ However, President Johnson was more active. “But perhaps the most noteworthy aspect of the response to Hurricane Betsy was the direct involvement of President Johnson, who took it upon himself to monitor the actions of federal agencies and mandated that federal personnel (including the director of OEP) remain in the stricken area to oversee relief operations. Thus, President Johnson modeled a new role for the president as an active and engaged emergency manager.” Brea, “The Formative Years: 1950–1978,” in *Emergency Management: The American Experience 1900–2010*.

⁹ After this thesis was begun, Hurricane Sandy battered the U.S. East Coast. During the response, President Obama took a very prominent role, including multiple meetings with the FEMA Administrator at FEMA headquarters; however, the research for this thesis was mostly completed before that event and was not included, in part because many of its lessons are still being digested. However, in Hurricanes Andrew and Katrina, which are discussed in depth later in this thesis, the President did not take a prominent role, at least until after the federal response struggled.

¹⁰ As will be discussed later, legally distinct chains of command are in place from the President to law enforcement agencies, and the DoD, and it will be argued, the whole of federal government directly involved in disaster response, or what was formerly called “consequence management.”

Academy of Public Administration (NAPA), the General Accountability Office (GAO)¹¹ and the federal FEMA Inspector General (IG), were found again in the thorough reports of the House and Senate on Hurricane Katrina. However, relevant material on the government's review of federal disaster interagency coordination can be found as far back as the 1950s in the annual reports of the Federal Civil Defense Administration. Congress also embarked on extensive hearings on the Disaster Relief Acts beginning with the first Act in 1950, and most recently with the Stafford Act in 1988, and the Post-Katrina Emergency Management Reform Act (PKEMRA) in 2006. The Congressional hearings in the wake of Hurricane Agnes in 1972, which later led to the Disaster Relief Act of 1974, provided crucial evidence of when federal disaster relief efforts can succeed when the president provides strong support through a single representative.

Understanding the evolution of federal interagency coordination in disasters would have been impossible without the documents provided to the Federation of American Scientists website by William Cumming, a former attorney with FEMA.¹² These documents revealed the origins of the current national disaster response plans, Emergency Support Functions (ESFs) and the various interagency forums created and then abandoned by the White House. They are especially revealing of the lack of coordinated federal interagency coordination before Hurricane Andrew and that at the time of the hurricane, two competing federal disaster coordination systems were actually in place.

After Hurricane Andrew, federal disaster response literature showed a spike in interest in the role of DoD forces, likely because the overwhelming success of the 1991 Gulf War, juxtaposed against Hurricane Andrew, led to a debate about whether disaster response should be taken over by the DoD. While the consensus was that the DoD should not take on disaster response, a position held by the DoD itself, DoD doctrine proved an invaluable resource when filling in the holes of current federal disaster response doctrine. For instance, it proved crucial to carving out the “operational” level of disaster response

¹¹ The GAO was formerly known as the General Accounting Office.

¹² Federal of American Scientists, “Federal Emergency Management Agency, Resources,” Updated August 26, 2013, <http://www.fas.org/irp/agency/dhs/fema/>.

and DoD doctrine promoting mission command provides a good example of how resources can be delivered from the operational to tactical level of disaster response.

The poor federal response to Hurricane Katrina spawned a slew of literature on how to improve the federal response to a disaster. The Congressional Research Service (CRS) had been issuing periodic reports on federal disaster readiness well before Katrina, which formed a good basis to judge subsequent literature on the subject. One unexpected source of information was various reports on federal disaster coordination by the Heritage Foundation, primarily authored by Dr. James Carafano. While the Heritage Foundation is well known for its conservative beliefs, Dr. Carafano's analysis, including a book on the subject, appeared to be evenhanded, and in addition to the documents provided by Mr. Cumming, provided another source on the history of federal interagency disaster coordination.¹³

A review of the literature on the Stafford Act revealed four general categories of articles: (1) Overview of the Stafford Act, (2) its support, or lack thereof for Federalism, (3) the utilization of military forces in relationship to the Stafford Act, and (4) specific grievances against provisions of the Stafford Act, which are usually centered around the grant programs to rebuild state facilities. A small subset on the issue of Federalism also exists around the discussion of criteria necessary to make a declaration under the Stafford Act and the political and economic influences and consequences. What does not appear is any sense of the utility of the Stafford Act; does it in fact make a good tool to execute federal responsibilities under the law? The lack of utilitarian or consequential discussion is unexpected given the greater prominence of the Stafford Act after Hurricane Katrina. Outside of CRS, however, its think tank cousins seem to have little interest in the Stafford Act. For instance, a review of the website for the RAND Corporation does not reveal one single substantive review of the Stafford Act. The only think tank that has taken somewhat of an interest was the Heritage Foundation, led primarily again by the analysis of Dr. James Carafano, who has consistently analyzed the Act in support of his

¹³ James Jay Carafano and Richard Weitz, *Mismanaging Mayhem: How Washington Responds to Crisis* (Westport, CT: Praeger Security International, 2008).

goal of a limited, federalized national government. While their goal may be to limit the responsibilities of the federal government, it does reserve a role for it during catastrophic disasters that overwhelm state resources.

A final crucial resource was locating several interviews and writings of Richard Falkenrath. Through his works, the reasoning behind the amalgamation of crisis and consequence management can be discovered, along with the misconception that having both crisis and consequence management had a detrimental effect on federal disaster coordination.¹⁴

C. METHOD OF INQUIRY

This thesis utilizes a policy analysis to determine which federal official might be best suited to exercise unity of command of the federal operational response to an existential catastrophe. Six federal officials or positions have been identified to implement unity of command. These officials are the Secretary for the Department of Homeland Security (DHS), the Secretary of Defense, the FEMA Administrator, the Principal Federal Official (PFO), the Federal Coordinating Officer (FCO), and agency secretaries and leaders chosen from agencies with technical expertise based upon the type of event, termed the lead federal agency model. In addition, a seventh choice exists, that of choosing the status quo based upon unity of effort.

Based upon the literature review, four criteria were chosen as they appear to reflect the baseline of necessary actions for the adoption of unity of command to provide a more efficient federal operational response. These criteria are (1) compliance with current law, (2) political acceptance by the president, Congress, federal agencies and the states, (3) efficiency in mobilizing, coordinating, and directing the federal response through identifying federal response capabilities, organizing federal response capabilities, coordinating federal response capabilities, directing federal response capabilities, and engaging the Whole Community for response, and (4) public acceptance including the Whole Community. Each alternative will be ranked against one another and the lowest

¹⁴ Falkenrath's views are discussed in detail in Chapter II under the subheading, The Distinction Between Crisis and Consequence Management.

score will indicate the most appropriate choice. As proof of concept, the federal response to Hurricane Katrina will be revisited and key decisions will be reimagined but with unity of command being exercised for the federal operational response. While Hurricane Katrina did not rise to the level of an existential catastrophe, it was chosen since it was the largest and most complicated disaster to strike the United States in the last two decades. This event probably comes closest to an existential catastrophe than any other recent incident.

D. A THESIS ROADMAP

When studying the federal response to major disasters, it is apparent higher levels of presidential interest in the response provide a positive impact on results.¹⁵ However, a tendency has occurred to distance the president from disaster response, some of which may come from the idea that the president's options are limited. Unlike the president's control over the military that has a very clear chain of command to combatant commanders, responsibility for the federal response is quickly scattered throughout the government, especially for preparedness.

Federal agencies respond to lesser emergencies under their own authorities on a continual basis. At some point, the idea appeared that the maximal federal disaster response authority embodied in the succession of Disaster Relief Acts could impinge on these agencies' standing authority if used to direct agencies' response efforts. Instead, over time, a framework based upon coordination, and ultimately, unity of effort came into place with the adoption of the National Incident Management System (NIMS) and the Incident Command System (ICS). However, these systems were based upon different facts and legal frameworks than the federal interagency.

¹⁵ See footnote 6. See also "Similar to the troubled national responses to Hurricanes Hugo and Andrew in 1989 and 1992 respectively, the federal government failed to recognize the magnitude of the situation presented by Hurricane Katrina prior to landfall, adequately project future needs, fully engage the President, and respond in a proactive and timely manner." U.S. House of Representatives, *A Failure of Initiative, Final Report of the Select Bipartisan Committee*, February 15, 2006, 131; "A catastrophic event requires decisive leadership at all levels—from the affected locality, to the state government, to federal agencies, and to the White House." U.S. Senate, *Hurricane Katrina: A Nation Still Unprepared, Special Report of the Committee on Homeland Security and Governmental Affairs*, S. Rept. 109–322, 2006, 233.

NIMS and ICS were formed for agencies that had equal jurisdiction through their legal responsibilities to protect either their citizens or property from fire. City firefighters might report to their mayor, county fire fighters might to their county board or supervisor, state resources might belong to the governor; federal supervisors report to an entirely separate government structure.¹⁶ None of these entities has the authority to tell the others what to do when responding to a wildland fire. In response, NIMS and ICS adopted a committee approach in which a forum could be created for these entities to come together to exchange information and attempt to make coordinated decisions. Unity of effort was the best solution to this problem when faced with multiple jurisdictional entities with equal authority.

The same facts do not apply to the federal interagency response to a disaster when the president has declared a major disaster or emergency under the Stafford Act for those agencies not engaged in law enforcement activities or the DoD. Unlike the assorted local, state and federal agencies engaged in fighting wildfires, all federal civilian agencies engaged in disaster relief under these circumstances, fall under the direct coordination and directive authority of the president.¹⁷ Over time, the power of the president to mobilize, coordinate, and direct the federal response under the Disaster Relief Acts has weakened as the offices coordinating the federal disaster response moved further away from the president.¹⁸ This lack of presidential supervision also affects pre-event preparedness activities including typing and credentialing of resources, planning, training and exercises. This situation may have occurred after President Nixon removed this authority from an office within the White House. Its leader had reported directly to him, and he spun it out to a new sub-agency created under the Department of Housing and Urban Development (HUD). At some point, the notion that the president could directly control the entire federal civilian response to a disaster seems to have disappeared.

¹⁶ The history and foundation of NIMS and ICS are discussed in detail in Chapter II: The adoption of the National Incident Management System, the Incident Command System, and the Multiagency Coordination System.

¹⁷ See discussion under Chapter II Stafford Act.

¹⁸ See discussion in Chapter II, which recounts the historical devolution of the power to coordinate the federal disaster response from the White House primarily to a sub-cabinet agency within HUD and eventually reconstituted over time within FEMA.

To show unity of command is a viable option for the president, this thesis retraces the progression of specific provisions of the Disaster Relief Acts. These statutes, and their accompanying regulations, form the statutory basis for the president's authority to mobilize, coordinate and direct the federal operational response to an existential catastrophe. It will show this authority is hidden in plain sight behind the meaning of the words "direct any federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under federal law," "coordinate all disaster relief assistance (including voluntary assistance) provided by federal agencies, private organizations," and "federal agencies may on the direction of the president, provide assistance essential to meeting immediate threats to life and property." Also discerned is that as Congress made this authority more flexible, federal regulations further restricted this authority. At some point, the federal interagency mistook what were decisions of policy placed into regulations as statutory barriers.¹⁹ A review of these statutes and regulations shows this is not true.

Accompanying this review is a brief outline of the current foundation of federal interagency disaster coordination. Beyond the historical reasons for the adoption of NIMS and ICS by the federal interagency, it examines how the federal government's current National Response Plan (NRP), the National Response Framework (NRF), was built upon older plans beginning in the 1980s. It scrutinizes the federal interagency coordinating mechanisms that grew alongside these national plans along with key executive orders (EOs) and the evolution of ESFs. It looks at the post-9/11 decision to remove the distinction between crisis and consequence management, and how this choice may have exacerbated issues with federal interagency coordination by trying to weld together two concepts that have distinctly different authorities. These difficulties also appear in the uneven supervision of the White House for federal interagency disaster

¹⁹ See Chapter II for a detailed discussion on how the directive authority of key federal response authorities within the Stafford Act diverged between the statutes and their implementing regulations. In addition, the federal government, and particularly FEMA, took very restrictive views of their response authorities. See pages 17 and 39–42 of FEMA's *Disaster Management Program: A Performance Audit After Hurricane Andrew*, Office of Inspector General H-01–93 (Washington, DC: FEMA, January 1993). It discusses the real world effects of FEMA's incorrect assertion that law prevented it from prepositioning and moving federal assets prior to a disaster declaration for Hurricane Andrew.

coordination with a succession of committees and interagency forums that came and went during the previous 25 years. Finally, the origins of the positions of the FCO and PFO are explored and placed into current context, including the decision after Hurricane Katrina by Congress to restrict use of a PFO significantly. The conclusion of this research shows unity of command for the federal operational response is a viable option for the president, and that the current interagency process to support the president and to coordinate federal disaster response can be improved.

The foregoing shows the need to improve the president's coordination and direction of the federal operational response to an existential catastrophe and that unity of command is a practical option. It is upon this basis, using a policy analysis approach, the previously stated alternatives to exercise unity of command on behalf of the president are examined using criteria developed from a review of the literature and historical research. The resulting inquiry shows the FEMA Administrator is probably best suited to take on this responsibility from the president. A retrospective look is then taken at the federal operational response to Hurricane Katrina, with a fully empowered FEMA Administrator re-envisioned when faced with key decisions during that crisis. This review also looks at the roles of the federal interagency to support the FEMA Administrator including the role of the president and a fully engaged DHS Secretary to provide the necessary strategic direction and advice.

The conclusion of this thesis is the current federal interagency process to mobilize, coordinate, and direct the federal operational response to an existential catastrophe is inadequate and can be improved by giving the president greater supervision over the response. It is especially true if the intent of the president is to be able to provide significant federal resources to an existential catastrophe within the first 72 hours of the event, which can be accomplished through the president clearly providing the authority to mobilize, coordinate, and direct the federal operational response to a single federal official, the FEMA Administrator. The Administrator would be supported by a robust federal interagency forum staffed by key federal officials with real authority to deploy resources within their agencies. This system must also be utilized in the preparation for existential catastrophes.

Based upon this conclusion, the following recommendations are made. First, the Emergency Support Function Leadership Group (ESFLG) needs to be revitalized and become the nexus for the federal interagency operational response to disasters. The ESFLG would provide a single focal point for the president to release all the resources of the federal government not engaged in law enforcement activities or part of the DoD based upon his strategic direction. During an existential catastrophe, it would form a Unified Area Command Group (UACG) and report through the FEMA Administrator directly to the president and the National Security Council (NSC). The ESFLG would be charged with prioritizing and distributing federal resources and capabilities, providing direction to distributed federal field operations and to summarily resolve any issues regarding these responsibilities unless otherwise directed by the president and the NSC.

Just as important as the ESFLG's role in disaster response, is its responsibility for disaster preparedness. It is vitally important that the same persons who will have operational control over federal response capabilities in an existential catastrophe also be the same federal officials who identify, organize, and otherwise, prepare them for the response. Organized around the congressionally mandated federal response capability inventory and the Catastrophic Resource Report, the ESFLG will identify and organize potential federal resources and capabilities for disaster response. Once identified, each capability would be tied to a pre-scripted mission assignment (PSMA). Mission assignments (MA), which by law belong to FEMA, are the tool that can both direct the deployment of these federal response capabilities and fund their operations. With the identification of federal response capabilities, coupled with PSMAs, the ESFLG can develop metrics for their implementation and exercise them to these standards. This process of identifying, organizing, and exercising would provide the basis for the steady state operation of the ESFLG.

Parallel to this internal federal effort, the ESFLG would also reach out to state and local governments, the private sector, and other members of the Whole Community. This outreach would have several objectives to include ensuring federal capabilities do not duplicate activities adequately prepared for by the Whole Community, and where possible, identify areas in which federal capabilities can support existing initiatives and

capabilities of the Whole Community. An example might include drawing upon the significant situational awareness capabilities of the federal government to empower a more efficient response of the Whole Community. Of course, this tactic might also work in the other direction as well where the ESFLG can identify Whole Community capabilities that lead to a more efficient federal response.

For these recommendations to be implemented, multiple stakeholders would need to consent to this new paradigm. These stakeholders are reflected in the criteria chosen to select the FEMA Administrator as best suited to exercised unity of command on behalf of the president. The most important is the president. If he chose to implement this new system, he could likely accomplish it through issuing a new EO declaring his intention for the ESFLG and the FEMA Administrator to execute his direction and leverage existing EOs, such as EO 12148 Federal Emergency Management, EO 12656 Assignment of Emergency Preparedness Responsibilities, and Presidential Policy Directive (PPD)-8 National Preparedness. While ESFLG preparedness activities may require federal agencies to shift existing funding or seek additional resources, by tying response activities to an existential catastrophe to the Disaster Relief Fund (DRF), they will have an existing source of funding that can be replenished by Congress more efficiently than its current agency-by-agency approach for disaster funding. However, at a minimum, the implicit support of Congress will be required, which always retains the right to restrict the funding of these activities.

The federal interagency will also need to accept unity of command as exercised by the FEMA Administrator with the support of the ESFLG. Even with the support of the president and Congress, federal agencies could feel threatened with a loss of authority and influence. These concerns may be ameliorated by the fact federal agencies would have access for the first time to funds in the DRF to fund disaster response activities previously paid for from their own coffers. In addition, federal agencies might also receive money and support for activities undertaken in support of the ESFLG's preparedness efforts.

It is also important that state governments understand the utility of this new system since the basis of federal disaster relief is to support state and local efforts. Education will be a key component as governors should be expressly reminded that in no way is the unity of effort affected, which will continue to exist between the federal and state governments.

II. THE PROBLEM WITH THE FEDERAL GOVERNMENT'S CURRENT ORGANIZATION IN PREPARING FOR AND RESPONDING TO AN EXISTENTIAL CATASTROPHE

The central concept in successful adaptation and response is a focus on working across traditional boundaries (legal, organizational, and cultural) and understanding that trust, networks, collaboration, and cooperation are the building blocks, traditionally, the primary means to accomplish this is unity of effort. The author uses this term in distinct contrast to the military or law enforcement term “unity of command,” in which the action of the organization occurs within a legal framework and compliance with orders is not discretionary.

The concept of unity of command has helped the United States create the greatest and most effective fighting force in the history of the world. However, practical and legal limits to the employment of military forces do exist.

Accordingly, we must seek to create unity of effort in an atmosphere in which there may be no legal authority to direct participants to act. That is the demand being placed on public administrators today, and it requires the acquisition of new leadership skills to create unity.²⁰

Admiral Allen may have been thinking about the Whole of Nation effort required to respond to an existential catastrophe. This effort includes the boundaries set forth in our Constitution and the principle of Federalism. However, what if legal authority and past history could make unity of command available to direct at least part of the federal effort to respond to a catastrophic disaster? Could the federal government have taken a system developed to work across existing legal, organizational, and cultural boundaries and had imposed it on itself where these boundaries did not exist? Would this use of unity of effort perversely lead to the creation of boundaries where they previously did not exist, and thus, negatively affect the federal response to catastrophic disasters?

²⁰ Thad W. Allen, “Confronting Complexity and Creating Unity of Effort: The Leadership Challenge for Public Administrators,” *Public Administration Review* 72, no. 3 (May/June 2012): 320–321.

A. THE PROBLEM

The lack of coordination of federal response efforts and the inability of the president to impose his will to marshal fully federal resources effectively were major problems identified after Hurricane Katrina. These problems appeared not just during the federal response to Hurricane Katrina but also in Hurricane Andrew in 1992.²¹ The inability of the president and the federal government to coordinate the federal response efficiently to a disaster appears consistently throughout 60 years of modern federal disaster response. For instance, the following exchange occurred during Congressional hearings that led to the Disaster Relief Act of 1974.²²

So effective had been Mr. Carlucci's brief sojourn that at the Wilkes-Barre hearings, two themes were frequently expressed: (1) that the FCO must be perceived as a personal representative of the president to be effective, and (2) that the word "coordinating" must be interpreted as administering and directing. The following colloquy occurred between Senator Burdick and Mr. Carlucci:

Senator Burdick. Most of the witnesses who testified in our Wilkes-Barre hearings would not agree with your comment that a "federal czar" is not needed for major disasters. Is it not true under Public Law 91-606 now that the federal Coordinating Officer named by the President for each major disaster has full coordinating power similar to a so-called czar?

Mr. Carlucci. He does on paper, Mr. Chairman, to be quite honest with you. But, as I indicated in my statement, when you have federal czars who are essentially civil servants, it is quite obvious that they don't have direct authority from the President and they do not have the power that I inherently had in my role in Wilkes-Barre. But they do have coordinating responsibility.

Senator Burdick. And they get that directly from the President.

²¹ For a list of those failures, see Chapter I Failures of the Federal Response to Hurricane Katrina. For Hurricane Andrew, see the GAO, NAPA and FEMA IG reports referenced in footnotes 38–40.

²² Frank P. Bourgin, *A Legislative History of Disaster Relief 1950–1974*, Federal Emergency Management Agency, 1983, 44.

Mr. Carlucci. They do get that directly from the President. There is a difference between getting it directly from the President on paper and getting it directly from the President in person.²³

The issues that plagued the federal response to Tropical Storm Agnes in 1972 have not faded with time. While speaking of a broader issue than just the federal response, one recent commentator stated, “The overarching characteristic of emergency management in the United States in 2010 is inadequate integration and coordination of the wide range of civilian and military, governmental, private sector, and nongovernmental organization participants (NGOs) in preparedness and response.”²⁴

When faced with an existential catastrophe, the president will be required to mobilize, coordinate and direct fully the core capabilities of the federal government in response.²⁵ As will be shown, short of direct, sustained daily involvement by the president, the current federal interagency response coordination system does not efficiently support these objectives. The current model of interagency federal leadership modeled upon unified command and based upon the concept of unity of effort is too loosely managed for the president to fulfill these objectives in the time critical environment of a catastrophic disaster. The failure of the current system of federal interagency coordination will be shown by specific examples from the response to Hurricane Katrina. This thesis will argue improving federal interagency coordination and direction, including the implementation of unity of command amongst federal civilian agencies, will fundamentally change and improve the federal response to an existential catastrophe.

²³ *History of Disaster Relief Acts 1983*, 44.

²⁴ William C. Banks, “The Legal Landscape for Emergency Management in the United States, New America Foundation,” February 25, 2011, http://newamerica.net/publications/policy/the_legal_landscape_for_emergency_management_in_the_united_states.

²⁵ “The President is the head of the federal government. The Constitution vests executive power in him. He is personally charged with taking care that the nation’s laws are faithfully executed. And while he has the apparatus of the entire federal government to aid him in discharging his Constitutional functions, he is no titular head of government. To the contrary, only he – or those working in the White House on his behalf—has the authority to order all federal agencies to take action, to resolve disputes among participating federal agencies, and to ensure that the government as a whole functions as it should in a time of crisis and catastrophe.” U.S. Senate, *Additional Views Senator Joseph I. Lieberman, Senator Carl Levin, Senator Daniel K. Akaka, Senator Thomas R. Carper, Senator Frank R. Lautenberg, and Senator Mark L. Pryor, Senate, Hurricane Katrina: A Nation Still Unprepared, Special Report of the Committee on Homeland Security and Governmental Affairs*, S. Rept. 109–322, 2006, 668.

B. THE INEVITABLE FUTURE OF AN EXISTENTIAL CATASTROPHE AND CHOICE OF CRITERIA TO CRAFT THE FEDERAL OPERATIONAL RESPONSE

In the last two decades, two disasters in the United States stand out, Hurricanes Andrew and Katrina, but neither rose to the level of an existential catastrophe. Despite the fact that neither hurricane was “the big one,” in each case, the federal response was judged a failure. One solution to the failure of the federal government to respond to the future existential catastrophe may be to focus on three criteria to improve the federal operational response to an existential catastrophe. The three criteria chosen are mobilization, coordination, and direction. These criteria were chosen for two basic reasons. First, these are the original “action” words used by the Congress when it began developing a formalized federal response to disasters and they continue to inform current law. Second, their concept and definition cover the essential tasks for preparing for and responding to catastrophes.

How to improve the federal operational response will be shown by taking specific examples from Hurricane Katrina, where it failed to meet at least one of the three criteria, and then project different outcomes based upon an alternative system of federal operational response premised on unity of command. This premise will not provide a solution to errors at the federal strategic or incident command levels, nor for the responses of the states that, with certain powers preserved under the Constitution, remain in a position of unity of effort with the federal response. However, by choosing to focus on the operational level, the highest level of decision making focused solely on the response to an existential catastrophe, it will provide some definition as to what actions must occur at the levels above and below it in the federal government and cover the broadest aspects of the federal response.

C. AN EXISTENTIAL CATASTROPHE

The nation deals with all manner of disasters and catastrophes every day; be it a car crash, an apartment fire, or a flash flood. These events are handled by the first responders of local government, or if they increase in size and scope, eventually with the support of state government. However, sometimes disasters are of such scope and

magnitude that the federal government acts to supplement state and local governments when they are overwhelmed. Of these larger events, a few manage to affect large swaths of the country and demand a different, more intensely focused response from the federal government. Moreover, of these, just a few threaten the stability and trajectory of the United States.

A “catastrophic incident”²⁶ is defined in the Homeland Security Act²⁷ but many events might meet this rationale but fail meaningfully to threaten the stability of the United States. Several types of truly catastrophic incidents could be reasonably imagined that could seriously threaten the ability of the United States to survive in its current form or dramatically weaken the nation for a prolonged period of time. These existential catastrophes could include the use of multiple nuclear weapons on U.S. soil, pandemic flu, a series of major earthquakes, or the collapse of the U.S. power grid that requires near complete reconstruction.

In the 236 years of its existence, the United States has managed to avoid facing an existential catastrophe. The New Madrid Earthquakes of 1811 and 1812 happened in a sparsely populated part of the country. The San Francisco Earthquake of 1906 was too distant from the rest of the country for the effects of its devastation to spread. The costliest disaster in U.S. history, the Great Chicago Fire of 1871, did no more than temporarily slow the growth of the then fifth largest city in the country.²⁸ Even the effects of Hurricanes Andrew and Katrina were largely regional. For instance, the area directly affected by Hurricane Katrina only accounted for about 2% of the nation’s gross

²⁶ 6 U.S.C. § 311. The term “catastrophic incident” means any natural disaster, act of terrorism, or other man-made disaster that results in extraordinary levels of casualties or damage or disruption severely affecting the population (including mass evacuations), infrastructure, environment, economy, national morale, or government functions in an area.

²⁷ *Homeland Security Act of 2002*, Public Law 107–296 (codified as amended at 6 U.S.C. §§ 101–1405).

²⁸ U.S. Library of Congress, Congressional Research Service, *Considerations for a Catastrophic Declaration: Issues and Analysis*, by Bruce R. Lindsay and Francis X. McCarthy, CRS Report R41884 (Washington, DC: Office of Congressional Information and Publishing, July 6, 2011), 10. If the economic value of lives were used, however, under that measure, the 1919 Influenza Pandemic would be the costliest with an estimated value of over four trillion dollars.

domestic product,²⁹ although the latter did have some effect on domestic gasoline prices.³⁰ However, numerous, plausible, and in some cases inevitable scenarios could result in the country facing its first existential catastrophic event.

Philip Bobbitt and Andrew Krepinevich both provide a handful of plausible scenarios that would dwarf any disaster yet experienced by this country. Bobbitt, in his book, *Terror and Consent*,³¹ provides examples of three disasters that could severely test the nation: a bio-engineered flu that subsumes the country, two earthquakes, the largest measuring 7.8 on the Richter Scale in northern California, and the launch of a single Russian Intercontinental Ballistic Missile that strikes the United States. Krepinevich's book, *7 Deadly Scenarios*,³² creates a feasible case of what might happen if terrorists managed to smuggle multiple nuclear weapons into the country and if the nation faced a pandemic. As another example, in 2009, the Mid-America Earthquake Center issued a report on the effects of what a 7.7 earthquake might look like if it struck the New Madrid Fault today.

Nearly 715,000 buildings are damaged in the eight-state study region. About 42,000 search and rescue personnel working in 1,500 teams are required to respond to the earthquakes. Damage to critical infrastructure (essential facilities, transportation, and utility lifelines) is substantial in the 140 impacted counties near the rupture zone, including 3,500 damaged bridges and nearly 425,000 breaks and leaks to both local and interstate pipelines. Approximately 2.6 million households are without power after the earthquake. Nearly 86,000 injuries and fatalities result from damage to infrastructure. Nearly 130 hospitals are damaged and most are located in the impacted counties near the rupture zone. Extensive damage and substantial travel delays occur in both Memphis, Tennessee, and St. Louis, Missouri, thus hampering search and rescue, as well as

²⁹ U.S. Library of Congress, Congressional Research Service, *The Macroeconomic Effects of Hurricane Katrina*, by Brian W. Cashell and Marc Labonte, CRS Report RS22260 (Washington, DC: Office of Congressional Information and Publishing, September 13, 2005), 1.

³⁰ Ibid., 5.

³¹ Philip Bobbit, *Terror and Consent: The Wars for the Twenty-First Century* (New York: Anchor Books, 2009).

³² Andrew F. Krepinevich, *7 Deadly Scenarios: A Military Futurist Explores War in the 21st Century* (New York: Bantam Books, 2009).

evacuation. Moreover, roughly 15 major bridges are unusable. Three days after the earthquake, 7.2 million people are still displaced, and 2 million people seek temporary shelter. Direct economic losses for the eight states total nearly \$300 billion, while indirect losses may be at least twice this amount.

Any of these events would severely threaten the long-term health of the nation and could rise to the level of an existential threat. For the purposes of this thesis, these types of events inform the definition of what is an “existential catastrophe.” While this thesis will not propose a standard for what the actual parameters of such losses could be, the closest government standard the nation may have to setting the level of losses that may lead to an existential catastrophe may be FEMA’s “Maximum of Maximums” (MOM) Initiative.³³

This was a worst-case scenario based on different hazards that challenges preparedness and overwhelms the response capabilities of every governmental level. The scenario, a no-notice event, contemplated the impact of at least 7 million population and 25,000 square miles, and involving several states and FEMA regions. It results in 190,000 fatalities in its initial hours, with 265,000 citizens requiring emergency medical attention. There is severe damage to critical infrastructure and key resources, including transportation.³⁴

D. DEFINITION OF AN EXISTENTIAL CATASTROPHE

For events of this magnitude, it is proposed that a new term be created to define their nature, scale and impact. An “existential catastrophe” results in cascading effects that extend well beyond the physical boundaries of the event. It directly affects one of the emerging 11 mega-regions within the United States,³⁵ and results in unforeseen or unmanageable national consequences. The defining characteristics of an “existential

³³ FEMA, “2012 The State of FEMA” (n.d.), http://www.fema.gov/pdf/about/state_of_fema/state_of_fema.pdf. “During the last two years, we have instituted a forward leaning approach to “Go Big, Go Early, Go Fast, Be Smart” by focusing on “Maximum of Maximums” planning. Key benchmarks for FEMA’s response and recovery resulting from a catastrophic event are to stabilize the event to meet the needs of survivors within 72 hours, restore basic services and community functionality within 60 days, and return communities to normalcy within five years.” FEMA, “2012 The State of FEMA,” 11.

³⁴ Sharon Caudle, “Homeland Security; Advancing the National Strategic Position,” *Homeland Security Affairs* 8, art. 11 (August 2012).

³⁵ America 2050, “Megaregions” (n.d.), <http://www.america2050.org/megaregions.html>.

catastrophe” would: (1) directly affect at least one of the 11 U.S. mega-regions, (2) result in either unforeseen or unmanageable cascading events beyond a mega-region, and (3) create a direct threat to the immediate stability or long-term prospects of the nation. A secondary characteristic of existential catastrophes is they turn traditional first responders into victims and survivors leaving state, federal and other non-local first responders to fulfill the roles normally held by traditional first responders. This thesis will seek to improve the federal response to an existential catastrophe by providing an alternative to the present system of mobilizing, coordinating, and directing the federal operational response to these existential catastrophes.

E. MOBILIZE, COORDINATE AND DIRECT AS MEANS TO PROVIDE UNITY OF COMMAND

To respond to an existential catastrophe, three key elements are proposed to the president fully harnessing the powers of the federal government: (1) mobilization, (2) coordination, and (3) direction. All three terms can be found in the earliest comprehensive federal laws addressing disasters. The three provide a basic framework for the basic elements of the federal response. Mobilization is defined as the ability of the president to force federal agencies to pivot their attention away from their primary duties and towards preparations to support the federal response to an existential catastrophe. Coordination is the ability of the president to provide order and efficiently distribute resources amongst federal agencies responding under their inherent, supplemental, or event triggered authorities, to respond to an existential catastrophe. Direction is the president’s ability, using either his Constitutional or congressionally provided authority, to order federal agencies to take specific actions, or courses of action, based upon his strategic, political, and to the extent exercised by the president, operational judgment. While similar to coordination, direction connotes the ability to order federal agencies to perform actions that they are either uncertain or unwilling to perform or would do so untimely.

This thesis submits that the most efficient way to improve the president’s ability to mobilize coordinate and direct the federal operational response to an existential catastrophe is through creating unity of command over the federal operational response to

an existential catastrophe. Unity of command for the purposes of this thesis will be defined as all federal capabilities not directly engaged in law enforcement activities or which are part of the DoD, that operate under a single leader with the requisite authority to direct all federal capabilities employed in response to an existential catastrophe.³⁶ The concept of unity of command is chosen because it may have been a substantial reason for the success of the single largest humanitarian effort in U.S. history, the restoration of Western Europe immediately after the end of the WWII.³⁷

The numbers of persons who needed to be fed, sheltered, and moved home were staggering for the U.S. Army in the Spring and Summer of 1945.

Housing themselves looked like a hopeless job for the Germans... Southern Bavaria, which had been a favorite refuge from the bombing, had an estimated two and a half million people more than its normal population. About half of an estimated seven million refugees who had escaped from eastern Germany ahead of the Soviet winter offensive were in SHAEF territory. Undamaged towns and cities had a third to a half again as many people as normal. In the heavily bombed big cities the populations were increasing-in Cologne, for instance, at a rate of 2,000 people a day during May but the cities could not accommodate all their former residents and were beginning to discourage the return of those who did not have needed skills or assured places to live...The worst consequence of unselement and overcrowding, a typhus epidemic, did not materialize. Serious outbreaks in the concentration camps-over four thousand cases in Dachau alone-led 12th Army Group to send out typhus-finding teams and dusting teams. By the end of May they had deloused a million persons and had used fifteen tons of DDT, and reports of new cases had decreased. Tuberculosis and venereal diseases, however, were on the rise.³⁸

³⁶ See discussion on page 41 as to why unity of command cannot include law enforcement and military activities. However, it will be noted later that should the President delegate the authority to direct the federal response under the Stafford Act to the Commanding General of USNORTHCOM, that person would be able to exercise unity of command over all but federal law enforcement activities.

³⁷ Earl F. Ziemke, "The U.S. Army in the Occupation of Germany 1944–1946," *Center of Military History United States Army, Washington, DC*, 1990, <http://www.history.army.mil/books/wwii/Occ-GY/>.

³⁸ Ibid., 278.

This endeavor was just a small part of the total effort. Twenty million Germans were homeless or without adequate shelter and many of the recently liberated Europeans needed to be sheltered, fed, and returned to their homes.³⁹

After V-E Day, SHAEF G-5 reckoned the total number of displaced persons uncovered in SHAEF-held territory, including those already repatriated as well as liberated prisoners of war, to be 5.2 million. All but about a million were in the areas of the two US army groups. They were being cared for by 102 UNRRA teams, about an equal number of French MMLA teams, and, wherever necessary, by the local military government detachments. The western Europeans were leaving as fast as transportation could be provided. In April the repatriation rate had been 35,000 persons a week; in May it jumped to over 200,000 a week.

“Willing though SHAEF was to have the displaced persons (DP) off its hands, some would have to stay a while, particularly the two million Soviet citizens, because their government had not indicated when or where it would receive them. For those who stayed, SHAEF ordered, “the conditions of living . . . improved to a standard as high as resources permit and without consideration of any adverse effect on the living conditions of the Germans.” While the German ration fell below 1,000 calories a day, the military government held the DP ration everywhere at 2,000 calories or more, even when this requirement meant, as it did in the Fifteenth Army area, drawing food from U.S. Army stocks. In the cities, the detachments moved thousands of Germans (10,000 in Munich for instance) out of their homes to make room for the displaced persons, and sick and wounded German soldiers were transferred out of hospitals to provide beds for them.”⁴⁰

In addition to the displaced, wayward citizens and former slave laborers, the U.S. Army also had to care for and process the millions of German prisoners of war (POWs) left in their hands. At end of the war, it is estimated that allied forces had 5 million German POWs on their hands, over 3 million in U.S. Army custody, and it is estimated that between just May 8 and July 15 of 1945, U.S. forces processed 7.7 million German POWs and associated personnel,⁴¹ which was not accomplished through feats of

³⁹ Ziemke, “The U.S. Army in the Occupation of Germany 1944–1946,” 283.

⁴⁰ Ibid., 284–285.

⁴¹ Ibid., 291.

technology. The U.S. Army mobilized, coordinated, and directed all these activities with the help of telephones, typewriters, telegraphs, radios, and couriers. No satellite phones, internet, computers, e-mail, or cell phones existed at that time. While it did have a pool of manpower measured in the millions, a huge set of challenges were also generated in addition to the millions of refugees and POWs, U.S. troops also needed to be housed, fed, and all the while remain a disciplined force. What the U.S. Army did have was a clear chain of command, from the leader of all allied forces, General Dwight Eisenhower, down to the individual corporal. Moreover, it worked.

F. DEFINITIONS AND ASSUMPTIONS

Critical to this thesis is the definition of core terms and concepts. Mobilization, coordination, and direction have already been defined but several other critical core concepts remain. First among these core concepts is “unity of command,” and the related but distinct, “unity of effort.” “Unity of effort through unified command” is one of the five key principles to federal response doctrine under the NRF. The NRF defines unity of effort as “respects the chain of command of each participating organization while harnessing seamless coordination across jurisdictions in support of common objectives.”⁴² For comparison, the DoD defines unity of effort as “coordination and cooperation toward common objectives, even if the participants are not necessarily part of the same command or organization—the product of successful unified action.”⁴³ This paper will adopt the former definition as its definition of “unity of effort.” The fundamental tenant of this definition is that federal agencies operate under separate chains of command while coordinating their actions. In other words, the ability to direct is not available across federal agencies under the current system of federal disaster response.

The two primary sources for a definition of “unity of command” in the current context normally should be the NRF or NIMS; however, neither provides a satisfactory definition. The NRF only mentions “unity of command” once, and only to indicate the

⁴² *National Response Framework*, January 2008, 10.

⁴³ *Joint Publication 1 Doctrine of the Armed Forces of the United States*, GL-11.

term has a unique legal and cultural meaning within the DoD. NIMS only defines “unity of command” at what might be considered the tactical level calling it “an Incident Command System principle stating that each individual involved in incident operations will be assigned to only one supervisor.”⁴⁴ The corresponding NIMS process at what could be the operational level, as opposed to the tactical level of ICS, is the Multiagency Coordination System (MACS). MACS makes no provision for unity of command and instead provides a process wholly reliant on concepts related to unity of effort.

Since current DHS/FEMA doctrine does not provide an adequate definition of unity of command, it is possible to resort to the DoD definition since both the NRF and the NIMS refer to it. The DoD definition is also relevant as the DoD also must produce an organization that can respond to existential threats in a short period of time. Accordingly, the DoD definition of “unity of command” found in Joint Publication (JP) 1 will provide the basis for the definition within this thesis. “Unity of command means all forces operate under a single CDR [commander] with the requisite authority to direct all forces employed in pursuit of a common purpose.”⁴⁵ This definition must be slightly modified given that the federal response includes both military and law enforcement activities.⁴⁶ Accordingly, the definition of “unity of command” for this thesis is “means all federal capabilities not directly engaged in law enforcement activities or which are part of the Department of Defense, operate under a single leader with the requisite authority to direct all federal capabilities employed in response to an existential catastrophe.”

Defining “operational” is a similar conundrum to looking for a definition for “unity of command.” Despite numerous references to the word “operational,” NIMS provides no definition for the term. The NRF only provides examples of what is not operational. However, the FEMA Incident Management Handbook (IMH) does provide a definition for “operational control,” which it calls “the transferable authority that may be

⁴⁴ *National Incident Management System (NIMS)*, December 2008, 149.

⁴⁵ *Doctrine for the Armed Forces of the United States, JP 1, 02 May 2007 Incorporating Change 1, 20, March 2009*, XV.

⁴⁶ The unique nature of federal military forces and law enforcement activities will be addressed later.

exercised by leadership at any level at or below the level of organization ... and is the authority to perform those functions of command over resources, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the mission will be assigned to the lowest operational level.”⁴⁷

The DoD has a useful definition of “operation,” which includes “A series of tactical actions with a common purpose or unifying theme.”⁴⁸ However, its definition of the operational level of war seems better suited for the purposes of this thesis, which it describes as “The level of war at which campaigns and major operations are planned, conducted, and sustained to achieve strategic objectives within theaters or other operational areas.”⁴⁹

To understand what “operational” really means, definitions for “strategic” and “tactical,” which are commonly used to divide various levels of command and action, are also helpful. Similar to “operational,” neither the NRF nor NIMS have a specific definition of “tactics.” However, within the context of the NIMS ICS, it can be inferred that tactics are exercised within ICS organizations. The IMH does have a definition for “tactics,” which are “the deployment and direction of resources during an incident to accomplish established incident objectives.”⁵⁰

FEMA’s Incident Action Planning Guide (IAPG)⁵¹ is also helpful, especially if it is assumed that the “incident” level is the same as the “tactical” level. According to the IAPG, “Tactics define specific actions to be performed to achieve a planned outcome. Tactics specify who, what, where, and when for implementing strategies to achieve incident objectives.”⁵² They are part of a planning process that seeks to establish incident objectives, and then, prioritize assigned resources, attempt to accomplish these objectives through assigning work to these resources and selecting the right tactics. However, the

⁴⁷ *FEMA Incident Management Handbook*, FEMA B-761, March 2009, Appendix J-14.

⁴⁸ *Joint Publication 3-0 Joint Operations*, GL-14.

⁴⁹ Ibid.

⁵⁰ Ibid., J-17.

⁵¹ *FEMA Incident Action Planning Guide*, January 2012.

⁵² Ibid., 24.

IAPG shows how difficult it is to come up with a definition of what is tactical, operational or strategic, as it manages to include “strategies,” “operational” and “tactics” all at the incident level.

The definition of strategy is handled similarly. The NRF declares that it falls under a National Strategy for Homeland Security but does not define the term. NIMS has a definition of “strategy” that is too generic to have much utility, “the general plan or direction selected to accomplish incident objectives.”⁵³ The White House National Strategy for Homeland Security, issued in 2007, states, “the purpose of our Strategy is to guide, organize, and unify our Nation’s homeland security efforts.”⁵⁴ Resorting again to the DoD Joint Publication, JP 3, Joint Operations, it calls strategy “a prudent idea or set of ideas for employing the instruments of national power in a synchronized and integrated fashion to achieve theater, national, and/or multinational objectives.” The DoD, like its definition for “operational,” also has a strategic level of war, “The level of war at which a nation, often as a member of a group of nations, determines national or multinational (alliance or coalition) strategic security objectives and guidance, then develops and uses national resources to achieve those objectives.”⁵⁵

Choosing from amongst these examples, for the purpose of this thesis, “tactical” is the “deployment and direction of resources at the incident consistent with operational and strategic objectives and intent,” which includes setting objectives, selecting tactics, assigning resources released to the tactical (or incident) commander and work assignments.

“Operational” is the level of decision making where “operational control over resources is provided to one or more incidents,” which includes the collection and provision of resources as authorized by strategic level decision makers, prioritization of resources amongst multiple incidents, and overall prioritization of effort and supervision in accordance with national strategic decision making. The authority to take these actions

⁵³ *National Incident Management System (NIMS)*, 147.

⁵⁴ *National Strategy for Homeland Security, Homeland Security Council*, October 2007, 1.

⁵⁵ *Joint Publication 3-0 Joint Operations*, GL-16.

would be considered “operational control.” Operational control also includes directional authority over all resources provided from the strategic to the operational level. Operational control remains with the operational commander, however, the actual choice of tactics, assignment of resources, and work to achieve incident objectives should be delegated to the tactical (incident) decision-making level. The operational level of decision making is the highest level of authority solely focused on the incident at hand.

“Strategic” is the level of decision making at which the nation’s vision and priorities are set and resources are created or assigned. The federal strategic level of decision making for disaster response should be thought of as part of a “strategic environment” in which unity of effort amongst federal, state, military, law enforcement, private sector, voluntary organizations, and citizens is established. In the context of responding to an existential catastrophe, the federal government balances its need to provide for national security, homeland security, civil liberties, fiscal health and legal and regulatory responsibilities while maximizing its response to the existential catastrophe. Unlike the operational level of decision making, the strategic level is not focused solely on any particular incident, but spans across all federal responsibilities.

G. MANIFESTATION OF THE PROBLEM

The current system for the president to mobilize, coordinate, and direct the federal response to large-scale disasters has been inadequate when tested by several near-catastrophic events, most recently Hurricane Katrina. A sampling of examples of these failures can be found in both the Senate⁵⁶ and House⁵⁷ reports on Hurricane Katrina. It follows that the current system would also be inadequate for the president and the federal government to respond to an existential catastrophe. For instance, speaking of the unified command between federal and state governments, the Senate report remarked, “A catastrophe, of course, is exactly when the need for unified command and an effective

⁵⁶ U.S. Senate, *Hurricane Katrina: A Nation Still Unprepared, Special Report of the Committee on Homeland Security and Governmental Affairs.*

⁵⁷ U.S. House of Representatives, *A Failure of Initiative, Final Report of the Select Bipartisan Committee.*

incident command structure is most acute.”⁵⁸ However, in the House report, both state and federal agencies confirmed federal agencies were “freelancing” during the disaster and bypassing the command structure.⁵⁹ In the Senate report, the FCO for Louisiana flatly stated he was not in charge of all federal operations.⁶⁰ As to who was actually in charge of the federal response, no clear answer was available, particularly as it pertained to the PFO and FCO positions. For example, again from the Senate report, multiple senior officials stated “two people were in charge” in both Louisiana and Mississippi. Bruce Baughman, President of the National Emergency Management Association and Director of the Alabama Emergency Management Agency, testified, “basically, in Louisiana, we had two people in charge. And it wasn’t real clear what the roles and responsibilities of each were.”⁶¹

Well before Hurricane Katrina, a similar outcry occurred after the perceived poor federal response to Hurricane Andrew. Of particular importance were reports from the NAPA,⁶² the GAO⁶³ and the FEMA IG.⁶⁴ The NAPA report was particularly comprehensive in not just critiquing what went wrong in the response to the hurricane, but in what specific actions Congress, the president, and FEMA must take to improve the federal response to future disasters. While the NAPA report served as a foundation for several changes, including the revocation of the Federal Civil Defense Act of 1950 and restating those authorities within the Stafford Act,⁶⁵ many of its recommendations would have to wait to be adopted until after Hurricane Katrina if at all.⁶⁶ The FEMA IG report

⁵⁸ U.S. House of Representatives, *A Failure of Initiative, Final Report of the Select Bipartisan Committee*, 561.

⁵⁹ Ibid., 189.

⁶⁰ U.S. Senate, *Hurricane Katrina: A Nation Still Unprepared, Special Report of the Committee on Homeland Security and Governmental Affairs*.

⁶¹ Ibid., 553.

⁶² Wamsley et al., *Coping With Catastrophe*.

⁶³ U.S. Government Accounting Office, *Disaster Management Improving the Nation’s Response to Catastrophic Disasters* (GAO/RCED-93-186, B-253822), Washington, DC: GPO, July 23, 1993.

⁶⁴ *Disaster Management Program: A Performance Audit After Hurricane Andrew*.

⁶⁵ *National Defense Authorization Act for Fiscal Year 1995*, 103 Public Law 337.

⁶⁶ U.S. Government Accounting Office, *Disaster Management Improving the Nation’s Response to Catastrophic Disasters*, 618.

also detailed numerous problems that would be repeated in Hurricane Katrina. One of the problems it identified was the lack of a command and control structure for the federal response. The primary reasons for this was the unfamiliarity of senior officials with the Federal Response Plan (FRP), the failure to plan for and integrate the Presidential Task Force and military Joint Task Force, and that there were ““on the books” two ways of coordinating federal assistance in catastrophic emergencies: the National System for Emergency Coordination [NSEC], established in 1988, and the “Federal Response Plan,” established in 1992.”⁶⁷

During the period of time between the two hurricanes, various exercises also included attempts at testing the coordination of the federal response to disasters. The Top Official (TOPOFF) series of national exercises, now called National Level Exercises (NLEs), produced a number of reports that provide some evidence that the issues of understanding the PFO and FCO roles were already causing problems and decision-making roles to lead the federal response were not clear.⁶⁸ The importance of having clear leadership and lines of authority in the response to a catastrophic disaster did not go unnoticed after Hurricane Katrina.

All the various critiques of Hurricane Katrina concluded that leadership at all levels of government should be improved. In preparing for, responding to, and recovering from any catastrophic disaster, the legal authorities, roles and responsibilities, and lines of authority for the preparation and response at all levels of government must be clearly defined, effectively communicated, and well understood in order to facilitate rapid and effective decision making.⁶⁹

All these problems were manifested in the federal operational response to Hurricane Katrina. Organized under the criteria of mobilization, coordination and direction, specific examples can be found in which failing to provide unity of command to the federal operational response directly led to numerous failures.

⁶⁷ *Disaster Management Program: A Performance Audit After Hurricane Andrew*, 72.

⁶⁸ *A Review of the Top Officials 3 Exercise*, DHS Office of Inspector General, OIG-06-07, November 2005.

⁶⁹ U.S. Government Accounting Office, *Disaster Management Improving the Nation’s Response to Catastrophic Disasters*, 618.

H. FAILURES OF THE FEDERAL RESPONSE TO HURRICANE KATRINA

The failure of adequate mobilization, coordination, and direction led to numerous, specific failures by the federal government in its response to Hurricane Katrina. The following are a list of specific instances during which the federal government failed to execute its responsibility to mobilize, coordinate, and direct. These events occurred at every level of response including the strategic, operational, and tactical, and are so noted. Some are used later as examples to show if unity of command for the federal operational response had been in place, these mistakes may have been mitigated or avoided.⁷⁰

1. Mobilization

(Strategic) The cabinet did not meet until over two days, some 57 hours, after Hurricane Katrina made landfall in Louisiana.⁷¹

(Strategic) No evidence or testimony by the DHS Secretary was available that demonstrated he reached out to other cabinet secretaries to assess their level of preparedness, to determine if they were coordinating efforts with DHS, or to ensure that they responded quickly and fully to any requests that might come from DHS or FEMA.⁷²

(Operational) The Department of Justice and DHS failed to plan for law enforcement assistance to a disaster. This failure directly led to FEMA personnel pulling out of the Superdome during the height of the crisis.⁷³

(Operational) The National Communications System (NCS) never developed a plan to restore communications to emergency responders, such as the police and fire departments, after a catastrophic disaster.⁷⁴

⁷⁰ Chapter IV is devoted to describing specific mistakes that might have been avoided if unity of command had been in place for the federal operational response to Hurricane Katrina.

⁷¹ U.S. Senate, *Hurricane Katrina: A Nation Still Unprepared, Special Report of the Committee on Homeland Security and Governmental Affairs*, 70.

⁷² Ibid., 165, 167.

⁷³ Ibid., 11, 448–453, 554–555.

⁷⁴ U.S. Senate, *Hurricane Katrina: A Nation Still Unprepared, Special Report of the Committee on Homeland Security and Governmental Affairs*, 166.

(Operational) DHS senior leadership failed to reach out to Immigration and Custom Enforcement (ICE), Customs and Border Patrol (CBP), Federal Protective Service (FPS) or the Secret Service to assess their planning and preparation—or even to determine if they *were* planning and preparing.⁷⁵

(Operational) DHS and FEMA failed to publish the Catastrophic Incident Supplement (CIS) to the Catastrophic Incident Annex (CIA), which would have provided at least a framework for contingency planning during the event.⁷⁶ Jeff Smith, Louisiana Office of Homeland Security and Emergency Preparedness (LOHSEP) Deputy Director for Emergency Preparedness, believed, “the biggest single failure of the federal response was the Department of Homeland Security’s failure to recognize that Katrina was a catastrophic event and implement the catastrophic incident annex to the National Response Plan...” However, the CIA required the CIS to actually operate. “Unless it can be credibly established that a mobilizing federal resource identified in the NRP-CIS is not needed at the catastrophic incident venue, that resource deploys.” He was waiting on the execution of a plan that never existed.⁷⁷

2. Coordination

(Strategic) The DHS Secretary did not activate the Interagency Incident Management Group (IIMG) until nearly 36 hours after landfall.⁷⁸

(Operational) The Homeland Security Operational Center (HSOC) failed to collect situational awareness from FEMA, the United States Coast Guard (USCG) or other federal agencies in a timely manner including the report from FEMA employee, Marty Bahamonde, on the evening of landfall that the levees in New Orleans had been

⁷⁵ Ibid., 166–167.

⁷⁶ Ibid., 554–555.

⁷⁷ U.S. House of Representatives, *A Failure of Initiative, Final Report of the Select Bipartisan Committee*, footnote 52, 53, 137; U.S. Senate, *Hurricane Katrina: A Nation Still Unprepared, Special Report of the Committee on Homeland Security and Governmental Affairs*, 554–555; CIA to NRP.

⁷⁸ U.S. House of Representatives, *A Failure of Initiative, Final Report of the Select Bipartisan Committee*, 133.

breached. It was not until 6:30 A.M. the following morning the White House considered the levees breached.⁷⁹

(Operational) Lack of clarity between the PFO and FCO roles.⁸⁰

(Operational) Lack of coordination between USCG and the DoD search and rescue (ESF #9).⁸¹

(Operational) Lack of coordination between American Red Cross and law enforcement.⁸²

(Operational) Joint Task Force-Katrina (JTF-Katrina) stops evacuation of the Superdome, which delays it a full day.⁸³

(Strategic/Operational) Mayor Nagin speaks to the president on Tuesday, August 30 saying buses are his number one priority but no mission assignment from FEMA occurs until around 1:30 P.M. the next day.⁸⁴

3. Direction

(Strategic) DHS Secretary is unsure of the role of the Secretary during a disaster or role under the NRP.⁸⁵

⁷⁹ U.S. House of Representatives, *A Failure of Initiative, Final Report of the Select Bipartisan Committee*, 140–142, U.S. Senate, *Hurricane Katrina: A Nation Still Unprepared, Special Report of the Committee on Homeland Security and Governmental Affairs*, 166,176, 239, 276, 680.

⁸⁰ Senate 552–553, U.S. House of Representatives, *A Failure of Initiative, Final Report of the Select Bipartisan Committee*, 135–136,190.

⁸¹ U.S. House of Representatives, *A Failure of Initiative, Final Report of the Select Bipartisan Committee*, 336, 344–347.

⁸² Ibid., 348.

⁸³ Ibid., 194.

⁸⁴ Senate, *Hurricane Katrina: A Nation Still Unprepared, Special Report of the Committee on Homeland Security and Governmental Affairs*, 70, 362.

⁸⁵ Ibid., 164–171,

(Strategic) DHS Secretary failed to stay in touch with his “battlefield commander” or to ensure he understood his role.⁸⁶

(Operational) No one understood if the PFO or FCO position was in charge or even who was in charge of federal response at operational level.⁸⁷

(Operational) The FCO was not leading all federal forces or providing clear direction. At least three separate structures led the federal response: the FCO, PFO, and JTF-Katrina.⁸⁸

(Operational) Failure to direct Department of Health and Human Services (HHS)/ESF #8 to pick up the bodies of victims.⁸⁹

I. THE CURRENT SYSTEM OF MOBILIZING, COORDINATING, AND DIRECTING THE FEDERAL RESPONSE

The current system of federal response to a catastrophe begins with the legal responsibility of the president to guide the nation’s response to a catastrophic disaster.

There is ample, mostly centralized legal authority for emergency response [by the federal government]. The national government is instructed in Article IV, Section 4 of the Constitution to guarantee a “Republican Form of Government” to each state (the Guarantee Clause), to protect the states against invasion (the Invasion Clause), and to protect them against “domestic Violence” (the Protection Clause). Though there is uncertainty about which of the political branches controls certain emergency response powers, by and large Congress has delegated broad discretion to the

⁸⁶ Senate 165, 203–205; White House, *The Federal Response to Hurricane Katrina Lessons Learned*, February 2006, endnote 136, 139 189; U.S. House of Representatives, *A Failure of Initiative, Final Report of the Select Bipartisan Committee*, 132, annex, 427; Arnold M. Howitt and Herman B. Leonard, ed., *Managing Crises: Responses to Large-Scale Emergencies* (CQ Press, 2009), 59, 67.

⁸⁷ Senate, *Hurricane Katrina: A Nation Still Unprepared, Special Report of the Committee on Homeland Security and Governmental Affairs*, 552–553, 561–562, 564; U.S. House of Representatives, *A Failure of Initiative, Final Report of the Select Bipartisan Committee*, 135–136.

⁸⁸ Senate, *Hurricane Katrina: A Nation Still Unprepared, Special Report of the Committee on Homeland Security and Governmental Affairs*, 561; U.S. House of Representatives, *A Failure of Initiative, Final Report of the Select Bipartisan Committee*, 189, Howitt and Leonard, *Managing Crises: Responses to Large-Scale Emergencies*, 65–66.

⁸⁹ Senate, *Hurricane Katrina: A Nation Still Unprepared, Special Report of the Committee on Homeland Security and Governmental Affairs*, 426; U.S. House of Representatives, *A Failure of Initiative, Final Report of the Select Bipartisan Committee*, 299.

executive branch to act in anticipation of and response to emergencies. States and their cities do retain the police powers to protect the health, safety, and welfare of their citizens, and in some contexts these reserved state prerogatives establish limits on the prescriptive authorities of the national government.⁹⁰

Congress has broadly delegated this authority for the president to act in the Stafford Act.⁹¹ The FEMA Administrator was also arguably given some direct power to lead the federal response to catastrophic disasters with the passage of the PKEMRA in 2006.⁹² However, this authority does not authorize the funding that the Stafford Act does with its complementary appropriations in the DRF,⁹³ nor does it give specific authority how the FEMA Administrator will actually lead the nation's efforts to respond to a catastrophic incident,⁹⁴ and conduct emergency efforts to save lives and protect property.⁹⁵

The Homeland Security Act (HSA)⁹⁶ states the mission of DHS is in part to “minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States [and to] carry out all functions of entities transferred to the Department, including by acting as a focal point regarding natural and manmade crises and emergency planning...”⁹⁷ The secretary also has vested in them “all functions of all officers, employees, and organizational units of the Department...”⁹⁸ However, PKEMRA added a provision to the HSA that specifically maintains FEMA as a distinct entity within DHS and does not allow the Secretary to “substantially or significantly

⁹⁰ Banks, “The Legal Landscape for Emergency Management in the United States, New America Foundation,” 7–8.

⁹¹ *Robert T. Stafford Disaster Relief and Emergency Assistance Act*, Public Law 93–288 (as amended primarily at 42 U.S.C. §§ 5121–5207).

⁹² *Post-Katrina Emergency Management Reform Act (PKEMRA) of 2006*, Public Law 109–295.

⁹³ For more information on the DRF, see FEMA, “Disaster Relief Fund” (n.d.), <http://www.fema.gov/disaster-relief-fund>.

⁹⁴ 6 U.S.C. §§313(b)(2)(A) & 314(a).

⁹⁵ 6 U.S.C. §§313(b)(C) & 314(a)(3) & 314(a)(9)(C).

⁹⁶ *Homeland Security Act of 2002*, Public Law 107–296 (codified as amended at 6 U.S.C. §§ 101–1405).

⁹⁷ 6 U.S.C. § 111.

⁹⁸ 6 U.S.C. § 112.

reduce the authorities, responsibilities, or functions of the Agency or the capability of the Agency to perform those missions, authorities, responsibilities, except as otherwise specifically provided in an Act enacted after the date of enactment of the Post-Katrina Emergency Management Reform Act of 2006.”⁹⁹ None of these authorities, however, relieves the president of their constitutional and congressionally delegated responsibility to mobilize, coordinate, and direct the federal response.

J. THE STAFFORD ACT

Putting aside arguments the president could proceed in organizing the federal response to a catastrophic disaster solely relying upon his Constitutional powers, the primary authority for the federal government to respond to a catastrophic disaster is found in the Stafford Act. The purpose of the Stafford Act is to “provide an orderly and continuing means of assistance by the federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters...”¹⁰⁰ To execute this purpose, Congress gave all the powers under the Stafford Act directly to the president with the power to “...prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this Act, and he may exercise any power or authority conferred on him by any section of this Act either directly or through such federal agency or agencies as he may designate.”¹⁰¹ The only exception, discussed later, is Title VI Emergency Preparedness, the remnants of the defunct Federal Civil Defense Act of 1950,¹⁰² which is given directly to the FEMA Administrator.¹⁰³

⁹⁹ 6 U.S.C. § 316.

¹⁰⁰ 42 U.S.C. § 5121(b).

¹⁰¹ 42 U.S.C. § 5201(a)(1).

¹⁰² *The Federal Civil Defense Act of 1950 as amended* (50 U.S.C. App. § 2251 *et seq.*) Public Law 81–920. It was repealed in its entirety in 1994 by *The National Defense Authorization Act for Fiscal Year 1995*, Public Law 103–337.

¹⁰³ See also 6 U.S.C. § 112(a)(2) where the DHS Secretary is given all the powers of DHS components. However, it is unclear whether this includes Title VI of the Stafford Act, especially in light of the PKEMRA provision codified at 6 U.S.C. § 316 that limits her power to remove certain powers and responsibilities from FEMA. The remnants of the Civil Defense Act are found in Title VI of the Stafford Act 42 U.S.C. §§5195–5197g. 6 U.S.C. § 5195b specifically orders that Title VI “shall be carried out by the Administrator of the Federal Emergency Management Agency.”

The authority of the Stafford Act for federal response actions can be thought of having two distinct characteristics, the first providing specific authority to save lives and protect property, and the second as an overall “meta-authority” that can be found in Sections 402 and 502 of the Act. This meta-authority allows the president once an emergency or major disaster has been declared under the Stafford Act to

...direct any federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under federal law (including personnel, equipment, supplies, facilities, and managerial, technical, and advisory services) in support of State and local assistance response and recovery efforts, including precautionary evacuations; coordinate all disaster relief assistance (including voluntary assistance) provided by federal agencies, private organizations, and State and local governments, including precautionary evacuations and recovery...¹⁰⁴

The particular purposes this meta-authority supports can be found throughout the sections of the Stafford Act for both major disasters and emergencies.¹⁰⁵ The primary powers for authorizing federal response activities are respectively the following.

- Providing assistance essential to meeting immediate threats to life and property resulting from a major disaster through
 - Federal resources, generally—utilizing, lending, or donating to state and local governments federal equipment, supplies, facilities, personnel, and other resources, other than the extension of credit, for use or distribution by such governments in accordance with the purposes of this Act.
 - Medicine, durable medical equipment, food, and other consumables—distributing or rendering through state and local governments, the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief and disaster assistance organizations, medicine, durable medical equipment, food, and other consumable supplies, and other services and assistance to disaster victims.
 - Work and services to save lives and protect property—performing on public or private lands or waters any work or services essential

¹⁰⁴ 6 U.S.C. § 5170a(1) see also 6 U.S.C. § 5192(a)(1).

¹⁰⁵ Given the scope of a catastrophic disaster, the assumption is that a major disaster would be declared by the President upon request by the governors of the affected states. While scenarios exist that may require the use of an emergency declaration if state governments are no longer capable of requesting a declaration, that discussion is beyond the scope of this thesis.

- to saving lives and protecting and preserving property or public health and safety
- Contributions—making contributions to state or local governments or owners or operators of private nonprofit facilities for the purpose of carrying out the provisions of this subsection.¹⁰⁶
- Providing through the use of federal departments, agencies, and instrumentalities, the clearing of debris and wreckage resulting from a major disaster from publicly and privately owned lands and waters, and making grants to any state or local government or owner or operator of a private non-profit facility for the purpose of removing debris or wreckage resulting from a major disaster from publicly or privately owned lands and waters.¹⁰⁷
- Providing through providing temporary housing units, acquired by purchase or lease, directly to individuals or households who, because of a lack of available housing resources, would be unable to make use of financial assistance provided by the President.¹⁰⁸

Subsequent to Hurricane Katrina, the President can now

Provide accelerated federal assistance and federal support where necessary to save lives, prevent human suffering, or mitigate severe damage, which may be provided in the absence of a specific request and in which case the President

(A) shall, to the fullest extent practicable, promptly notify and coordinate with officials in a State in which such assistance or support is provided, and;

(B) shall not, in notifying and coordinating with a State under subparagraph (A), delay or impede the rapid deployment, use, and distribution of critical resources to victims of a major disaster.¹⁰⁹

This last provision, added by PKEMRA, allows the president, once he has issued a major disaster declaration, to provide emergency assistance even if the state government is unable to coordinate with the federal government. It could be thought of as the “Superdome Provision,” such that if federal officials can clearly see a need to act, they can move forward on their own.

¹⁰⁶ 42 U.S.C. § 5170b see also 42 U.S.C. § 5192.

¹⁰⁷ 42 U.S.C. § 5173 see also 42 U.S.C. § 5192.

¹⁰⁸ 42 U.S.C. § 5174(C)(1)(B)(i).

¹⁰⁹ 42 U.S.C. § 5170a(5) see also 42 U.S.C. § 5192(a)(8).

The Superdome during Hurricane Katrina is an example of what can happen when information has failed to arrive through state channels but the federal government is fully aware of the problem. “Asked about “thousands of people at the convention center in New Orleans no food, zero,” [DHS Secretary] Chertoff responded that “we are getting food and water to areas where people are staging.” Then he remarked, “The thing about an episode like this is if you talk to someone and you get a rumor or you get someone’s anecdotal version of something, I think it’s dangerous to extrapolate it all over the place.” When the interviewer, Robert Siegel pressed the issue, pointing out that experienced reporters had witnessed the scene in person, Chertoff answered, “Well... actually I have not heard a report of thousands of people in the convention center who don’t have food or water.”¹¹⁰

Taken at face value, Congress has provided the president, upon request of a governor, dramatic power to respond to catastrophic disasters. Congress has conferred the necessary authority to *any* federal agency to save lives and protect property, essentially *providing authority to unlock federal capabilities*, and the authority to command these agencies through direction and coordination.¹¹¹ The president can also choose to reimburse these federal agencies from the DRF when responding under directions issued under the authority of the Stafford Act, and thus, provide both authority and appropriations.

However, the authority granted to the president contains two notable exceptions. The first is no direct authority under the Stafford Act to make arrests and enforce the law, which can only be done by federal law enforcement agencies responding to a disaster

¹¹⁰ Howitt and Leonard, *Managing Crises: Responses to Large-Scale Emergencies*, 59. See also CNN.com, “The Big Disconnect on New Orleans,” September 2, 2005, <http://www.cnn.com/2005/U.S./09/02/katrina.response/>.

¹¹¹ See footnotes 121–124.

exercising their own authorities to make arrests.¹¹² Law enforcement efforts, relying on separate authority, are supplemental to the primary purpose of saving lives and protecting property, which are accomplished by the president directing a federal agency “to utilize its authorities and the resources granted to it under federal law.” However, the Stafford Act does allow for a law enforcement agency to “utilize its authorities,” which means they can be tasked to provide safety and security as a part of federal response efforts and reimbursed for those efforts, but they still must rely on separate authorities to make arrests and enforce the law. In other words, federal law enforcement agencies can be mobilized and coordinated as part of the larger federal response effort but they cannot be directed under the authority of the Stafford Act to make arrests. The second exception is that while federal military forces may be provided the authority to engage in life and property saving actions, the Stafford Act does not confer operational control of those forces. Federal troops follow a separate statutory chain of command.¹¹³

This chapter has provided evidence the federal government has a poor record of responding to large disasters, such as Hurricanes Andrew and Katrina, and cannot currently be expected to have an efficient response to an even larger disaster, an “existential catastrophe,” without changes to the way it is organized. It proposes that instituting unity of command over the federal response to an existential catastrophe, at the operational level, might result in a more efficient federal response.

The current system of coordinating and directing federal agencies responding to a catastrophic disaster has never fully utilized its expansive authority to direct non-federal

¹¹² See the Enumerated Powers to Save Lives and Protect Property found in Sections 403 and 502 of the Stafford Act. None of them includes any authority to enforce the law or make arrests. However, Section 402 and 502(a)(1) both allow the President to direct federal agencies to “utilize their authorities and resources granted to it under federal law.” This “meta-authority” allows those agencies to use their existing authority to support response efforts but does not create new authority to enforce the law and make arrests. Less any doubt lingers about this, the Office of Legal Counsel opined on this issue in 2012 emphatically stating the Stafford Act does not contain authority to make arrests. *Opinion of the Office of Legal Counsel – State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments*, OLC LEXIS, 2012, 3.

¹¹³ See 10 U.S.C. § 162 and § 164.

military capabilities not engaged in law enforcement activities.¹¹⁴ To understand why, it is necessary to retrace the history of certain provisions of the Stafford Act and the federal regulations that provide that authority and allow for the reimbursement of federal agencies from funds appropriated to execute the Stafford Act. Funding is a key component to directing federal agencies and provides evidence of how the federal government was historically responding to disasters. Without funding, authority to act relies on an empty capability.

After retracing the history of regulations and law under the Disaster Relief Acts (DRAs), discussion will turn to the foundation of the current federal interagency response to disasters in addition to the Stafford Act. This foundation includes: (1) The NIMS, the ICS, and the MACS, (2) federal response plans and frameworks, (3) the consolidation of crisis and consequence management, (4) EO 12148 Federal Emergency Management, EO 12656 Assignment of Emergency Preparedness Responsibilities, and Presidential Policy Directive (PPD)-8 National Preparedness, (5) federal interagency coordination bodies and White House supervision, and (6) the FCO and PFO positions.

¹¹⁴ For example, see the discussion in Chapters II and V on how the federal government has never issued the federal response capability inventory, and just last year, the Catastrophic Resource Report. If the federal government has never issued these reports, it is difficult, if not impossible, to argue it has ascertained the full extent of all its capabilities to respond to an existential catastrophe.

III. THE HISTORY OF FEDERAL RESPONSE LAW FOR THE COORDINATION, DIRECTION AND REIMBURSEMENT OF FEDERAL AGENCIES UNDER THE DISASTER RELIEF ACTS AND THE FOUNDATION OF FEDERAL INTERAGENCY DISASTER COORDINATION¹¹⁵

The purpose of this chapter is to provide evidence the president has the authority to implement unity of command through a single federal official. This ability to provide unity of command is limited, however, and does not include federal agencies engaged in law enforcement efforts or the DoD, which has its own distinct chain of command, though they would both support the efforts of this official. This authority would also allow the president to utilize the DRF to reimburse federal agencies for disaster work, which could be performed under their existing authority. It would be a key tool for the federal official exercising unity of command on behalf the president, and crucial to ensuring the cooperation of federal agencies. It would also allow Congress a simpler, and possibly, more efficient way to fund federal response costs for an existential catastrophe. This chapter also provides evidence FEMA's regulations, which currently prohibit reimbursement from the DRF to federal agencies acting under their own authority but coordinated under the Stafford Act, are based on policy, not law.

Several key observations can be arrived at after a thorough review of the history of the DRAs and federal interagency disaster coordination. The first is the president does have the ability to provide unity of command amongst all federal civilian agencies engaged in responding to an existential catastrophe but excludes the DoD, and federal agencies engaged in law enforcement activities, but does includes the ability to reimburse

¹¹⁵ In May 2013, DHS, through FEMA, released a new version of the NRF and a draft of its supporting Federal Interagency Operational Plan–Response. This thesis does not address the newest version of the NRF, but after a summary review, it should not affect its conclusions. However, it should be noted the position of PFO no longer appears in the newest version of the NRF, although it does reference the DHS Secretary as the principal federal official in relation to their role set forth in HSPD-5. Unless otherwise noted, all references to the NRF are to the previous version.

any federal agency for work ordered under this authority.¹¹⁶ Second, the adoption of ICS and its premise of unified effort amongst federal agencies is not a legal requirement, but a matter of policy, and could be replaced with a system built on unity of command. Replacing unity of effort with unity of command would be consistent with the singular authority of the president rather than a system of multiple equal jurisdictional authorities that provides the foundation for ICS. Third, the consolidation of crisis and consequence management may have been done under a faulty premise; namely, that it did not allow for a clear answer as to who was in charge of the federal response. A return to these distinctions may better reflect the reality of disaster response and allow for the proper prioritization of efforts and appropriate leadership during a response to a terrorist or criminal incident. Currently, the consolidation of these two concepts may serve as an impediment to providing unity of command. Fourth, two key EOs, 12148 and 12656, contain guidance that could support a system based on unity of command for both response and preparedness.

In addition, the PKEMRA set forth specific parts of a national preparedness system, not reflected in PPD-8, that would be of exceptional value to preparing for an existential catastrophe; the creation of a federal response capability inventory and Catastrophic Resource Report. A stronger federal preparedness posture, utilizing a form of unity of command, could be used to push federal agencies to complete these tasks, and also fulfill their responsibilities under EO 12656. Fifth, a historical lack of discipline has occurred in federal interagency coordination during disasters, as well as the role of the White House in supervising federal agency coordination.¹¹⁷

Currently, no clear conduit for federal operational interagency disputes to be elevated to the White House or for cabinet level discussion exists, and if it does, that system does not reflect the one implemented to adjudicate policy disputes. In other

¹¹⁶ However, FEMA's regulations currently prohibit reimbursing federal agencies for performing work under their own disaster assistance authorities. This regulation has been interpreted as a complete ban on reimbursement. See 44 CFR 206.8.

¹¹⁷ For instance, see the discussion of the use of the IIMG under identified failures in coordination during Hurricane Katrina in Chapter I and under federal interagency coordination groups and White House supervision later in Chapter II.

words, the federal government “fights” (responds) differently than it “trains” (prepares). Last, the role of PFO, as performed by Admiral Thad Allen after Hurricane Katrina, is probably defunct,¹¹⁸ but the FCO position is legally and historically suited to exercise unity of command on behalf of the president.

A. THE DISASTER RELIEF ACT OF 1950¹¹⁹

The modern statutory framework for federal disaster assistance began with the Disaster Relief Act (DRA) of 1950.¹²⁰ On March 2, 1951, President Truman issued EO 10221,¹²¹ which delegated his authority to execute sections of the DRA of 1950 to the Housing and Home Finance (HHF) Administrator. Later, on January 16, 1953, the president issued EO 10427,¹²² which revoked EO 10221, and moved the functions given to the HHF Administrator to the Federal Civil Defense Administration.

Section 3 of the DRA of 1950 provided much of the antecedent language that eventually became Sections 304, 402, and 403 of the Stafford Act. For instance, from Section 3 of the DRA of 1950, came the following statement.

The authority conferred by this Act, and any funds provided hereunder shall be supplementary to, and not in substitution for, nor in limitation of, any other authority conferred or funds provided under any other law. Any funds received by federal agencies as reimbursement for services or supplies furnished under the authority of this section shall be deposited to the credit of the appropriation or appropriations currently available for such services or supplies.

The language of Section 304 of the Stafford Act can be directly traced to this provision. Its last sentence, which serves to provide relief from the Miscellaneous Receipts Statute appears unchanged in Section 203(c) of the DRA of 1970, and Section 307 of the DRA of 1974. What is now the first sentence of Section 304 was joined to the

¹¹⁸ See discussion under PFO later in Chapter II.

¹¹⁹ See Appendix B for the full text.

¹²⁰ *The Disaster Relief Act of 1950*, Public Law 81–975.

¹²¹ *EO 10221 Providing for the Administration of Disaster Relief* 16 FR 2015, March 6, 1951.

¹²² EO 10427 was subsequently amended three times by EO 10737, October 29, 1957, EO 10773, July 1, 1958, and EO 11051, September 27, 1962 before being revoked by EO 11575 on December 31, 1970 with the passage of the *Disaster Relief Act of 1970*, Public Law 91–606.

second sentence in the DRA of 1970. The antecedent to the first sentence of Section 304 is found in Section 7 of the DRA of 1950, which also is the predecessor of Section 306 of the Stafford Act. In relevant part it states:

Any federal agency, in performing any activities under section 3 of this Act, is authorized... to incur obligations on behalf of the United States by contract or otherwise for the acquisition, rental, or hire of equipment, services, materials, and supplies for shipping, drayage, travel and communication, and for the supervision and administration of such activities. Such obligations, including obligations arising out of the temporary employment of additional personnel, may be incurred by any agency in such amount as may be made available to it by the President out of the funds specified in section 8. The President may, also, out of such funds, reimburse any federal agency for any of its expenditures under section 3 in connection with a major disaster, such reimbursement to be in such amounts as the President may deem appropriate.

Section 3 of the DRA of 1950, also stated the following.

In any major disaster, federal agencies are hereby authorized when directed by the President to provide assistance by utilizing or lending, with or without compensation therefore, to States and local governments their equipment, supplies, facilities, personnel, and other resources, other than the extension of credit under the authority of any Act.

This more closely aligns with what is currently Section 403 of the Stafford Act but it still maintains provisions common to Section 402. This crossover is not unexpected since until the DRA of 1974 created the category of Emergency, Congress established only one category of incident, Major Disaster, to trigger federal assistance.

Section 3(a)-(d) of the DRA of 1950 was moved with minimal changes to Section 203(a)(1)-(4) of the DRA of 1970 and then moved to Section 306(a)(1)-(4) of the DRA of 1974 from whence it was moved to Section Stafford Act Section 403(a)(1)-(3) as parts of it were combined. Especially important was the part that would eventually become the broad authority to save lives and property granted to any federal agency tasked by the president.

In any major disaster, federal agencies are hereby authorized when directed by the President to provide assistance by utilizing or lending, with or without compensation therefor, to States and local governments their equipment, supplies, facilities, personnel, and other resources, other than the extension of credit under the authority of any Act.

From Section 5(a) of the DRA of 1950, it also stated the following.

In the interest of providing maximum mobilization of federal assistance under this Act, the President is authorized to coordinate in such manner as he may determine the activities of federal agencies in providing disaster assistance. The President may direct any federal agency to utilize its available personnel, equipment, supplies, facilities, and other resources, in accordance with the authority herein contained.

This language was carried forward without change through Section 203(f) of the DRA of 1970 and Section 302(a) of the DRA of 1974. This section closely aligns with Section 402(2) of the Stafford Act. This is supported by the chart on page 7 of the Report of the Committee on Environment and Public Works United States Senate to accompany Senate Bill 2380, Report 100-524, September 22, 1988 which shows “federal Assistance” moved to Section 402 of the Stafford Act and page 16 of the same where the Committee states “The new section 402 is drawn from sections 302(a) and 305(b) of the 1974 Act.” The language of the Senate bill is identical to what later appeared in Public Law 100-707. Section 5 provided the language that has become Section 402 of the Stafford Act, or what can be called its meta-authority.¹²³

Sections 3 and 5 of the DRA of 1950 would form the crux of the authority for the federal government to execute “the intent of Congress to provide an orderly and continuing means of assistance by the federal Government to States and local governments in carrying out their responsibilities to alleviate suffering and damage resulting from major disasters.”¹²⁴ In addition, in Section 8 of the DRA of 1950, Congress appropriated \$5,000,000 to carry out the purposes of the Act.

In sum, the DRA of 1950 provided the antecedent authority that became Sections 402 (meta-authority to coordinate and direct) and 403 (specific authority to save lives and

¹²³ See previous discussion of “meta-authority.”

¹²⁴ *Disaster Relief Act of 1950*, Public Law 81-875, Section 1.

protect property) of the Stafford Act, funds to execute the Act (akin to the present day DRF provided by Congress to carry out the Stafford Act) and provided that the funds given to execute the DRA of 1950 were “supplementary to, and not in substitution for, nor in limitation of, any other authority conferred or funds provided under any other law.” Interestingly, this last provision did not prohibit paying other federal agencies for work performed under their own authorities; only that these funds were supplementary to their existing authority and appropriations.

B. REGULATIONS AND EXECUTIVE ORDERS TO EXECUTE THE DISASTER RELIEF ACT OF 1950

Obviously, some method would have to be implemented by the Administrator of the Federal Civil Defense Administration to execute the president’s authority to direct federal agencies. While research did not uncover rules or regulations on how the Administrator actually exercised this authority, the 1953 Annual Report for the Federal Civil Defense Administration stated the following in its chapter on the DRA of 1950.

Many agencies of the federal Government have statutory authority and appropriations which allow them to operate in disaster situations. When the problem is of greater magnitude than can be handled by existing authority and funds, the President will invoke the provisions of the Disaster Relief Act and provide additional federal assistance to supplement State and local efforts and existing federal authorities.

Upon the invocation of this law and declaration of a “major disaster” by the President, FCDA has the authority to call on the resources of all federal departments and agencies. This assistance must be provided by the federal agencies, with or without reimbursement, at the President’s discretion.¹²⁵

This language is not ambiguous. When called upon by the president, through the Federal Civil Defense Administration, federal agencies *must* follow the president’s orders, with or without reimbursement.

On October 29, 1957, President Eisenhower issued EO 10737, Further Providing for the Administration of Disaster Relief.¹²⁶ As part of the EO, the president added three

¹²⁵ *1953 Annual Report Federal Civil Defense Administration*, 19.

¹²⁶ Published at 22 FR 8799 on November 1, 1957.

additional provisions to Section 1 of EO 10427 giving additional authority to the Federal Civil Defense Administration to reimburse federal agencies.¹²⁷ These provisions provided the first evidence that federal agencies were actively being reimbursed for work ordered by the head of a federal agency tasked with coordinating and directing the federal response to a disaster. Under Section 2 (e)(2), the president:

Could allocate funds for use in connection with the specific major disaster.

The funds so allocated to the Administrator may be utilized by him... (ii) for reimbursement pursuant to the provisions of section 1 (c) of Executive Order No. 10427 of January 16, 1953, as added by this order.¹²⁸

On February 24, 1960, the Office of Civil and Defense Mobilization (OCDM), which had assumed the duties of the Federal Civil Defense Administration,¹²⁹ published the first regulations on the reimbursement of federal agencies performing major disaster relief functions at Title 32 Part 1709 of the Code of federal Regulations.¹³⁰ It signaled the birth of the “mission assignment”.¹³¹ In its annual report from that year, the OCDM explicitly stated that some of the funds used for disaster relief went to the reimbursement of federal agencies.¹³²

These original regulations of the OCDM would remain unchanged until they would be updated to reflect the DRA of 1970. Additional changes would be made upon

¹²⁷ *EO 10737 Further Providing for the Administration of Disaster Relief*, Section 3, October 29, 1957.

¹²⁸ Section 1 (c) of EO 10427 refers to the provision in Section 7, the antecedent language to Section 304 of the Stafford Act, that allows the Federal Civil Defense Administration , through his delegation from the President in EO 10427, to reimburse other federal agencies from funds appropriated to Execute the Act by Congress in Section 8. Reimbursement of other federal agencies would be cautioned, however, on the basis of part of Section 3 of the DRA of 1950 that stated the “authority conferred by this Act, and any funds provided hereunder shall be supplementary to, and not in substitution for, nor in limitation of, any other authority conferred or funds provided under any other law.”

¹²⁹ *EO 10773 Delegating and Transferring Certain Actions and Affairs to the Office of Defense and Civilian Mobilization*, July 1, 1958.

¹³⁰ Published at 25 FR 1587, February 24, 1960.

¹³¹ So far, the earliest use of the term “mission assignment” found by the author was for tornados in Texas in May 1970. At that time, the DRA of 1950 had not yet been replaced by the DRA of 1970. See Congressional Record July 8, 1970 23207. For a further explanation of MAs, see Appendix A.

¹³² *Annual Report 1960 Executive Office of the President Office of Civil and Defense Mobilization*, 58–59.

the passage of the DRA of 1974¹³³ but they would remain mostly intact until FEMA, which inherited these regulations and transferred them to Title 44 of the Code of Federal Regulations, would replace them in 1989 after the passage of the Disaster Relief and Emergency Assistance Act Amendments of 1988.¹³⁴ Even now, much of the language for FEMA's current regulations can be directly traced to the original OCDM regulations.

What is noteworthy about the original OCDM regulations from 1960 is for the first time, federal agencies were advised they would not be reimbursed for "costs incurred while performing work under a federal agency's own authority subsequent to the president's declaration of a major disaster (except as provided in 1709.2)." ¹³⁵ Thus can be seen when one of the current impediments to exercising unity of command; the inability to reimburse federal agencies when ordered to respond to a disaster, may have begun. This regulation, however, would have been consistent with the law at that time that any funds provided to execute this law would be "supplementary to and not in substitution for" funds provided for under any other authority or law. However, this regulation was not a blanket prohibition against reimbursement. Section 1709.2 of these regulations otherwise generally allowed for reimbursement of federal agencies, subject to certain criteria, which otherwise would have not been reimbursed, stated as follows.

When determined to be in the best interests of the Federal Government reimbursement to other federal agencies for expenditures in the performance of disaster relief assistance, made at the direction of the Director, OCDM (hereinafter called the Director), pursuant to section 1 (a) of EO 10427, as amended, may be approved for the following:

- (a) Overtime, travel, and per diem of regular federal agency personnel diverted from their normal duties as a result of a directive from the Director.
- (b) Work, services, and materials contracted for by other federal agencies for assistance performed on a specific disaster project.

¹³³ Public Law 93–288.

¹³⁴ Public Law 100–707. This law renamed the *Disaster Relief Act of 1974* The Stafford Act among many substantive changes.

¹³⁵ 32 CFR 1709.3 (1960).

(c) Materials, equipment, and supplies (including transportation, repair, and maintenance) from regular inventory stocks utilized or consumed by other federal agencies.

(d) Emergency work performed under provisions of section 5(a) of the Act at the specific direction of the Director prior to a declaration of a major disaster: *Provided*, That such work shall be otherwise eligible under section 3 of the Act upon the declaration of a major disaster:

And provided further, That reimbursement may not be sought if no funds are allocated by the President for disaster assistance, and that such costs shall not include funds expended or supplies and materials used by federal agencies performing disaster work under their own authority where funds therefore may be otherwise available or may be made available.

(e) Such other costs or expenditures not otherwise provided herein, as the Director and the Director of the Bureau of the Budget may approve, based upon the written justification submitted to the Director by the agency concerned, or as agreed to in writing between the Director and other federal agencies, and concurred in by the Director of the Bureau of the Budget.

These OCDM regulations also referred back to two important sections of President Eisenhower's' EO 10427. Section 1(a) of this EO referred to the Director of OCDM's ability to direct other federal agencies, under the authority delegated to him by the president, to execute Section 3 of the DRA of 1950. Section 3 provided a blanket authorization to federal agencies, when tasked under this section, to provide assistance they otherwise could not, which is the forerunner to the Section 403 specific authority of the Stafford Act. Section 3 provided the key to unlock "authority" for federal agencies that otherwise have one of the enumerated "capabilities" in Section 3 to assist but not the inherent "authority" to utilize these capabilities. Read in conjunction with Section 7 of the DRA of 1950, Section 3 allowed these activities to be reimbursed from funds appropriated to execute the DRA of 1950.

Section 5(a) of the DRA of 1950 provided a slightly different purpose. This provision of the DRA of 1950 is the direct predecessor of Section 402 of the Stafford Act and states, "The President may direct any federal agency to utilize its available personnel, equipment, supplies, facilities, and other resources, in accordance with the authority herein contained." This sentence allowed the president to direct federal agencies to utilize

their *available* resources. To be already “available” means these resources could already have participated in disaster relief under *existing* authority. To argue otherwise means that these resources were not “available” on their own accord and that Section 5(a) is essentially duplicative of Section 3, particularly Section 3(d). Section 5(a) must serve a purpose that adds to what already exists under Section 3. It is also instructive to look at this section’s progeny, Section 203(f) of the DRA of 1970, and the discussion of what this provision means by the Congressional Committee Conference.¹³⁶

The President would be further authorized to coordinate the activities of federal agencies providing disaster assistance, direct any federal agency to utilize its funds, personnel, equipment, supplies, facilities, and other resources ...¹³⁷

The different purposes of Section 3 and Section 5(a) were reflected in the OCDM regulation 32 CFR 1709.2, which is why it has separate sections for each, although reimbursement for Section 5(a) activities was limited to pre-declaration activities. It is also why 1709.3 has a clause at the end of its paragraph denying reimbursement for “costs incurred while performing under a federal agency’s own authority subsequent to the president’s declaration,” it reflects the ability of the president to both coordinate and direct resources already available to assist, which means the authority to utilize these resources existing outside of the DRA of 1970. In line with Congress’s direction in Section 3 that “the authority conferred by this Act, and any funds provided hereunder shall be supplementary to, and not in substitution for, nor in limitation of, any other authority conferred or funds provided under any other law” the OCDM regulations prohibit, both in 1709.2(d) and 1709.3(d), reimbursement for costs for work that the federal agency already had the authority and appropriation to perform on its own after a major disaster declaration.¹³⁸

¹³⁶ The DRA of 1970 altered the statute slightly by adding the terms “with or without reimbursement” to the statute so it reads as follows: The President may direct any federal agency, *with or without reimbursement*, to utilize its available personnel, equipment, supplies, facilities, and other resources in accordance with the authority, herein contained.

¹³⁷ *Disaster Relief Act of 1970, Conference Report* [To accompany S. 3619], Report No. 91-1752, December 15, 1970, 20.

In 1709.2(d), it does state that reimbursement may be sought for “Emergency work performed under provision of section 5(a) of the Act at the specific direction of the Director prior to a declaration of a major disaster; *Provided*, That such work shall be otherwise eligible under section 3 of the Act upon the declaration of a major disaster; *And further*, That reimbursement may not be sought if no funds are allocated by the president for disaster assistance, and that such costs shall not include funds expended or supplies and materials used by federal agencies performing work under their own authority where funds therefore may be otherwise available or may be made available.” While it is not clear why the regulations allow for the reimbursement of work done under existing authority prior to a declaration, one possibility is that Congress wanted to encourage federal agencies to act proactively in response to an event and that these regulations reflect this. The point of this exception for reimbursing pre-declaration work is that federal agencies could depend on being reimbursed either through funds dedicated to execute the scope of work covered under Section 3 of the DRA of 1950 or through their own appropriations as supplemented by Congress. This latter suggestion may be what the language “funds therefore may be otherwise available or may be made available” represents. This caveat serves to preserve the requirement that funds provided under Section 3 must be “supplementary to... funds provided under any other law.”

Until the passage of the DRA of 1970 on December 31, 1970, the sum total of the law and regulations meant the following criteria applied to the directives that, by at least May, 1970, were called MAs.

- Federal agencies without the authority to act could be directed by the Director of OCDM¹³⁹ to perform certain work under Section 3 of the DRA of 1950, essential measures to save lives and protect property, and could be reimbursed at the discretion of the Director of OCDM if funds were available.
- Federal agencies with existing authority to assist after a disaster could have their work coordinated by the Director of OCDM, and to further this power to coordinate, the Director could direct their work performed under

¹³⁹ EO 10737 did provide that the Director of OCDM could delegate any duty or function under EO 10427 to anyone within OCDM, or to the heads of any agency with their approval. As discussed later, OCDM would later be replaced by the Office of Emergency Planning later itself changed to the Office of Emergency Preparedness.

their own authority, but federal agencies could not seek reimbursement from funds dedicated to execute the DRA of 1950 except for a limited exception for work done prior to a major disaster declaration under 32 CFR 1709.2(d), which was consistent with the law that required that reimbursement for this work may not be in “substitution for, nor in limitation of, any other authority conferred or funds provided under any other law.”

- All directives authorizing the performance of work and the expenditure of funds must have been in writing and contain a clause that establishes a ceiling amount for expenditures so authorized.

C. THE DISASTER RELIEF ACT OF 1970¹⁴⁰

Subsequent to the DRA of 1950, Congress passed the Disaster Relief Acts of 1966 and 1969, neither of which affected any provisions relevant to this discussion, although the 1969 Act did create the FCO position.¹⁴¹ On December 31, 1970, Congress passed the Disaster Relief Act of 1970,¹⁴² which repealed the DRA of 1950 and DRA of 1969 in their entirety and all but one section of the DRA of 1966. The provisions of Sections 3, 5(a) and 7 of the DRA of 1950 were all recodified in Section 203 of the DRA of 1970. Section 3 became Section 203(a), although the section for reimbursing federal agencies was peeled off into its own Section 203(c), Section 5(a) became Section 203(f), and Section 7 became Section 203(e).¹⁴³

This recodification resulted in two substantive changes. Most importantly, the provision of the DRA of 1950 making all assistance under the Act “supplemental and not in substitution for” was removed without comment in any of the legislative history. In its place was added what now appears as the first sentence of Section 304 of the Stafford Act, “Federal agencies may be reimbursed for expenditures under this Act from funds appropriated for the purposes of this Act.” Related to this, the reimbursement language

¹⁴⁰ See Appendix C for the full text.

¹⁴¹ *Disaster Relief Act of 1966*, Public Law 89–769; 80 Stat 1316; *The Disaster Relief Act of 1969*, Public Law 91–79; 83 Stat 125.

¹⁴² *Disaster Relief Act of 1970*, Public Law 91–606; 84 Stat 1744.

¹⁴³ Even though Section 203 of the DRA of 1970 is labeled “Cooperation of Federal Agencies in Rendering Emergency Assistance,” Congress had not yet created a second category of event known under the Stafford Act as an “emergency,” as of the DRA of 1970, only the designation of “major disaster” existed and it used emergency to describe the assistance provided after a major disaster.

that once appeared in Section 7 of the DRA of 1950 did not carry over to Section 203(e) of the DRA of 1970, likely because it was redundant to the new 203(c), which now addressed reimbursement for all these sections.

Second, what had previously been Section 5(a), and now had become Section 203(f) added that the president (or the person delegated this power) could direct any federal agency to perform work under the authority of 203(f) “with or without reimbursement.” Coupled with the removal of the language that previously made assistance “supplemental and not in substitution for,” it now meant by the plain reading of the statute that federal agencies could be reimbursed for work that could have been accomplished under their own authority independent of the DRA of 1970, which is supported by the legislative history of the Act.

It may be asked why Congress chose to add language allowing reimbursement into Section 203(f) but not 203(a). Work performed by federal agencies under Section 203(a) was by its nature work it did not have the authority to do on its own (which if it had in the first place would be covered under Section 203(f)) so that if in fact it performed such work, it logically follows that the authority to perform the work, provided by Section 203(a) would be followed by funds to reimburse the work. The authority for reimbursement flows from Section 203(c), which by its terms applies not just to Section 203(a) but the entire Act. It could be then be asked, if Section 203(c) applied to the entire Act, including Section 203(f), why did Congress even need to add reimbursement language to Section 203(f)? It can be assumed it was done to reinforce the fact Congress wanted to create the flexibility to reimburse federal agencies from funds appropriated to execute the DRA of 1970 for work that ostensibly could have been performed and paid for under their existing authorities and appropriations.

The Joint Committee Report is silent as to reimbursement under 203(f) but plainly speaks to reimbursement for activities execute under Section 203(a).

Federal agencies could be reimbursed for services and supplies under Section 203(a) from funds appropriated under this Act. Any funds paid to federal agencies for services or supplies furnished under the provisions of this section would be deposited to the credit of the appropriation or appropriations currently available for such services or supplies.¹⁴⁴

More specific reference may be found in the individual reports of the Senate and House. Section 203 of the DRA of 1970 was essentially the same as the provisions of the Senate bill.¹⁴⁵ In the Senate's report, it simply says for the section as a whole, "Reimbursement of a Federal Agency for services or supplies it furnishes is to be deposited to the credit of its appropriation for these items."¹⁴⁶ It does not distinguish between work performed under Section 203(a) or Section 203(f). As for Section 203 in its entirety, it states that while "based largely on a similar provision of Section 3 of Public Law 81-875... the powers conferred therein are in this bill clarified, extended and expanded."¹⁴⁷ Therefore, if any view must be taken, it is that Section 203 provides more, not less flexibility and power to the president.

The House report is even more favorable. In its report, the House in its discussion of the Senate bill states that Section 8 "amends section 7 of Public Law 81-875 so that obligations may be incurred by any federal agency in such amount as may be made available to it by the president out of funds available under this act."¹⁴⁸ As to Section 9, it "authorizes the President to utilize the resources of federal departments or agencies for use in disaster relief, with or without reimbursement, as he deems appropriate. Similar authority was granted by Sections 3 and 7 of Public Law 81-875..."¹⁴⁹ These two sections are then discussed again later in their report:

¹⁴⁴ *Disaster Relief Act of 1970*, Conference Report No. 91-1752, 19.

¹⁴⁵ *Ibid.*, 20.

¹⁴⁶ *Disaster Assistance, Report Together with Individual Views [To accompany S. 3619]*, Senate Report 91-1157, August 31, 1970, 10.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Disaster Relief Act of 1970, Report [To accompany S. 3619]*, Report No. 91-1524, September 29, 1970, 4.

¹⁴⁹ *Ibid.*

Section 8... The 1950 act would be further amended to provide that obligations may be incurred by an agency in the amount as may be made available out of funds specified to carry out this act or section 9 of the Disaster Relief Act of 1966 and the Disaster Relief Act of 1969 instead of only funds specified under section 8 of the 1950 Act.

Section 9. This section grants the President authority to use all federal departments or agencies to the best advantage under varying conditions to exercise the authorities granted him by this act, the act of September 30, 1950... the Disaster Relief Act of 1966 and the Disaster Relief Act of 1969.

D. REGULATIONS UNDER THE DISASTER RELIEF ACT OF 1970

On January 28, 1971, the Office of Emergency Preparedness (OEP), to whom the functions of OCDM had been passed by a previous EO, updated 32 CFR Part 1709 to account for the changes in the DRA of 1970.¹⁵⁰ The provisions of 1709 were barely changed. 44 CFR 1709.2 was expanded to include additional categories of costs that would be reimbursed. What had previously been 1709.2(d) had been designated 1709.2(i) and now read as follows.

(i) Work performed at the specific direction of the Director when a major disaster is imminent: *Provided*, That such work would be otherwise eligible upon the declaration of a major disaster: *And provided further*, That such costs shall not include funds expended or supplies and materials including medical stockpiles delegated under E.O. 10958; August 14, 1961, used by federal agencies performing disaster work under their own authority where funds therefore may be otherwise available or may be made available.

Section 1709.3, Expenditures Not Eligible for Reimbursement, was changed in that it eliminated two of its four paragraphs, and (d), which previously read as “Costs incurred while performing work under a federal agency’s own authority subsequent to the president’s declaration of a major disaster (except as provided in § 1709.2),” which was relettered (b), and simply stated “Costs incurred while performing work under a federal agency’s own authority.” This change seems to have eliminated some of the discretion to pay. What is interesting in these two changes is while the law changed to allow the

¹⁵⁰ OEP had been delegated the powers previously delegated the pertinent powers related to the DRA of 1970 under EO 11575, which revoked EO 10427.

discretionary reimbursement of federal agencies directed to perform work under the DRA of 1970, but which could have been done under their existing authority, the regulations go in the opposite direction and further restrict reimbursement.

From this point on, the restriction of using funds dedicated to pay for work performed under the Disaster Relief Acts, and later Stafford Act, appears to have been based upon a regulation grounded in policy rather than mandated by law. In other words, the current practice of not using the DRF to pay for the work of federal agencies conducting disaster relief under their own authorities, which could have also been ordered under the specific life saving and property preserving authority of the Stafford Act, is one of policy. If this were true, it would mean that current law would not need to be changed to allow for a federal official, exercising unity of command over the federal operational response to an existential catastrophe under the authority of the Stafford Act, to reimburse federal agencies for work they could have performed under their inherent authority. The current law would allow that person to both direct federal agencies to respond to an existential catastrophe and reimburse them for their efforts.

The regulations governing reimbursement would continue in effect¹⁵¹ until April 19, 1976 when the federal Disaster Assistance Administration (FDAA) issued new reimbursement regulations to execute the DRA of 1974.¹⁵²

To summarize, the *regulations* as they existed during this period to execute the DRA of 1970:

- Federal agencies, at the discretion of the President, could be reimbursed for work performed as directed under Section 203(a) of the DRA of 1970 from funds available to execute the DRA of 1970.
- Federal agencies, whose work was either coordinated or directed under the authority of Section 203(f), could not seek reimbursement from funds appropriated to execute the DRA of 1970.

¹⁵¹ Although these regulations were transferred on February 22, 1974 to Title 24 of the Code of Federal Regulations when HUD, through the FDAA, was delegated the relevant powers to execute the DRA of 1970 by EO 11725, but no changes were made to the regulations.

¹⁵² See 41 FR 16476.

- All directives authorizing the performance of work and the expenditure of funds must be in writing and contain a clause that establishes a ceiling amount for expenditures so authorized.
- The statutory prohibition to prevent the reimbursement of federal agencies from funds appropriated to execute the DRA of 1950 for life saving and property preserving activities they could already perform under their own authority was removed, but federal regulations continued to carry this restriction.

E. THE DISASTER RELIEF ACT OF 1974¹⁵³

On May 22, 1974, Congress passed the Disaster Relief Act of 1974.¹⁵⁴ The DRA of 1974 repealed the DRA of 1970 with the exception of several sections not of interest.¹⁵⁵ Section 203 of the DRA of 1970 was divided into new and separate sections of the DRA of 1974. Section 203(a) became Section 306, Section 203(f) became Section 302(a), and Section 203(c) became Section 307. Section 306 was nearly the same as Section 203(a) except that its final paragraph covering the performance of emergency work on public or private lands was reworded.

42 U.S.C. 5146(a) (4) Performing on public or private lands or waters any emergency work or services essential to save lives and to protect and preserve property, public health and safety, including but not limited to : search and rescue, emergency medical care, emergency mass care, emergency shelter, and provisions of food, water, medicine, and other essential needs, including movement of supplies or persons; clearance of roads and construction of temporary bridges necessary to the performance of emergency tasks and essential community services; provision of temporary facilities for schools and other essential community services; demolition of unsafe structures that endanger the public; warning of further risks and hazards; public information and assistance on health and safety measures; technical advice to State and local governments on disaster management and control; reduction of immediate threats to life, property, and public health and safety; and making contributions to State or local governments for the purpose of carrying out the provisions of this paragraph.

¹⁵³ See Appendix D for the full text.

¹⁵⁴ *Disaster Relief Act of 1974*, Public Law 93–288; 88 Stat 143.

¹⁵⁵ *Ibid* at Section 603.

Section 302(a) was reworded to make it mandatory that the president “shall coordinate, in such manner as he may determine, the activities of all federal agencies providing disaster assistance...” The rest of the paragraph expanded the list of resources and eliminated the requirement that the direction to utilize these resources be done “in accordance with the authority, herein contained.”

42 U.S.C. 5142(a) In the interest of providing maximum mobilization of federal assistance under this Act, the President shall coordinate, in such manner as he may determine, the activities of all federal agencies providing disaster assistance. The President may direct any federal agency, with or without reimbursement, to utilize its available personnel, equipment, supplies, facilities, and other resources including managerial and technical services in support of State and local disaster assistance efforts ...

Section 203(e) became Section 309 of the DRA of 1974, but with its reimbursement language removed in the 1970 version, it no longer related to the direction and coordination functions of the president.

Section 203(c) was unchanged when it was moved to its own section. Neither the Joint Committee report¹⁵⁶ nor the Senate report¹⁵⁷ provide any guidance other than to restate the words of the statute. However, the fact that the reimbursement provisions, with the exception of the provisions “with or without reimbursement” in Section 302(a), were now wholly consolidated in its own statute is important. In addition to Sections 302(a) and 306, Congress specifically provided statute specific programs to be delivered under the DRA of 1974, a process begun under the DRA of 1970.¹⁵⁸ If the FDAA wished to implement these programs with the assistance of other federal agencies, particularly those which would be offered alongside the assistance delivered under 306(a)(4), Section 307, allowing for the reimbursement of activities, *must* apply to the entire DRA of 1974 to provide authority to transfer funds between appropriations without violating the Transfer

¹⁵⁶ *Disaster Relief Act Amendments of 1974, Conference Report [to accompany S. 3062]*, Report No. 93–1037, May 13, 1974.

¹⁵⁷ *Disaster Relief Act Amendments of 1974*, Report of the Committee on Public Works to accompany S. 3062, Report No. 93–778, April 9, 1974.

¹⁵⁸ See the following sections under the DRA of 1970: Sec 222 Emergency Communications; Sec 223 Emergency Transportation; Sec 224 Debris Removal; Sec 226 Temporary Housing Assistance; Sec 238 Food Coupons and Distribution; Sec 239 Legal Services; Sec 240 Unemployment Insurance.

Statute,¹⁵⁹ or the Miscellaneous Receipts Statute.¹⁶⁰ Section 307 is doubly important for the latter proposition, because Section 302(a), while it includes language allowing for the transfer of funds between appropriations, does not include an exception to the Miscellaneous Receipts Statute. Without applying Section 307 to Section 302(a), any federal agency reimbursed under that statute would be forced to place those funds in the miscellaneous receipts fund of the General Treasury and not replenish their own funds expended for the work.¹⁶¹ More evidence can thus be seen that the law, at this point in time, now allowed for the reimbursement of federal agencies when directed to perform work under the DRA. However, this divorce between regulation and law would continue through the DRA of 1974 and its implementing regulations.

F. REGULATIONS UNDER THE DISASTER RELIEF ACT OF 1974

The FDAA issued new regulations for the reimbursement of other agencies on August 2, 1976 that replaced those for the DRA of 1970.¹⁶² As a clerical issue, the regulations for federal disaster assistance had been moved to Title 24 Part 2205 of the Code of Federal Regulations to reflect that HUD, through the FDAA, was now the primary federal agency coordinating and providing federal disaster assistance.¹⁶³ The regulations for reimbursement of federal agencies were now joined in the same Part 2205, and would be the regulations FEMA would inherit and republish when it was created in 1979.

Several changes to these updated regulations for reimbursement were made. For the first time, the regulations now explicitly stated that federal agencies could be reimbursed for work under the language of Section 302(a) in its preamble.

¹⁵⁹ 31 U.S.C. § 1532.

¹⁶⁰ 31 U.S.C. § 3302(b).

¹⁶¹ Ibid.

¹⁶² 41 FR 32359.

¹⁶³ The authority to implement these regulations was delegated to the Secretary of HUD pursuant to EO 11795, 39 FR 28227, July 15, 1974, and was delegated from the Secretary of HUD to the Director of the FDAA pursuant to a Delegation of Authority, 39 FR 28227, August 5, 1974.

41 FR 32359. On April 19, 1976, the federal Disaster Assistance Administration of the Department of Housing and Urban Development published proposed regulations in the federal Register (41 FR 16476) to establish certain procedures and criteria for reimbursement to other federal agencies providing disaster assistance under the *Disaster Relief Act of 1974*, (Public Law 93–288, 42 U.S.C. 5121 note) by adding a new Subpart H to Part 2205. Section 302(a) of the Act authorizes the President to direct any federal agency, with or without reimbursement, to utilize its available personnel, equipment, supplies, facilities, and other resources in support of State and local disaster assistance efforts... Subpart H supersedes previous regulations on this subject, 24 CFR 2201, adopted pursuant to the *Disaster Relief Act of 1970* (Public Law 91606, 42 U.S.C. 4401 et seq.). Section 2205.82(a) of Subpart H sets forth with great specificity certain expenditures not eligible for reimbursement. Except as noted, there were no other major substantive changes from the previous regulations.

Previously, the authority that now resided in Section 306, backed by authority for reimbursement that now rested in Section 307, was the primary justification for reimbursing federal agencies. The FDAA had now turned this on its head without providing any further reasoning why it was not relying on the arguably broader authority of Section 307. The new regulations were completely silent as to relationship to Sections 306 and 307, which does not mean these sections were not used to direct and reimburse federal agencies for their efforts in providing disaster assistance after a major disaster. However, it is interesting that the FDAA chose to specifically invoke the “with or without reimbursement” language of Section 302(a) after it could be argued that authority had been ignored for the previous six years.

The other major change came with the regulation on Expenditures Not Eligible for Reimbursement being combined with eligible expenditures under a new Section 2205.82 Eligibility of Certain Expenditures for Reimbursement. In addition to listing eligible expenditures, its first line now read “The [FDAA] Administrator or the [FDAA] Regional Director may not approve reimbursement of costs incurred while performing work under an agency’s own authority.”¹⁶⁴ This new language was essentially identical to the reimbursement language for the regulations in effect to execute the DRA of 1970 despite the fact that in its preamble, the regulation specifically cites Section 302(a),

¹⁶⁴ 24 CFR 2205.82(a) (1976).

which allows the president to “direct any federal agency, with or without reimbursement, to utilize its *available...* resources.” One logical explanation is that if federal agencies were directed by the FDAA under the authority of Section 302(a) to perform work they could have ordinarily done on their own, that authority for that particular work flowed not from their standing authority but from Section 302(a). In other words, this work would be eligible for reimbursement from funds appropriated to execute the DRA of 1974. The regulations appearing at 24 CFR 2205 would later be adopted wholesale by FEMA on September 28, 1979 after it had assumed responsibility to execute the DRA of 1974 under EO 12127, 12148 and Reorganization Plan No. 3 of 1978, and retitled in 44 CFR Part 205.¹⁶⁵

To summarize, the regulations as they existed during this period to execute the DRA of 1974 are as follows.

- While silent as to Section 306, there was no reason to indicate that federal agencies, at the discretion of the President, could not be reimbursed for life saving and live preserving work performed as directed under Section 306 of the DRA of 1974 from funds available to carry out the DRA of 1974. This presumably flowed from the authority to transfer funds, and to deposit them in an agency’s own funds to the exclusion of the miscellaneous receipts fund, from Section 307.
- Federal agencies, whose work was directed under the authority of Section 302(a), could now seek reimbursement from funds appropriated to execute the DRA of 1974. However, it was offset by the language of 2205.82(a) declaring, “costs incurred while performing work under an agency’s own authority” were not eligible for reimbursement, which could be read as the ineligible work would be that disaster assistance not performed at the direction of the FDAA, but only coordinated with the FDAA.
- All directives authorizing the performance of work and the expenditure of funds must be in writing and contain a clause that establishes a ceiling amount for expenditures so authorized.

¹⁶⁵ See 44 FR 56173.

G. THE STAFFORD ACT

On November 23, 1988, Congress passed the Disaster Relief and Emergency Assistance Amendments of 1988 (DREAA). The DREAA amended the DRA of 1974¹⁶⁶ and renamed it the Stafford Act.¹⁶⁷ It made significant changes to the DRA of 1974 including adding a second designated category of assistance for “emergencies” alongside “major disasters.”¹⁶⁸ Once again, the statutes were recodified in different sections. Section 307 of the DRA of 1974 was moved to Section 304 of the Stafford Act. Section 302(a) had its first two sentences removed and the rest became what is now Section 402¹⁶⁹, Section 306 of the DRA of 1974 became Section 403 of the Stafford Act.

In the two reports issued on the DREAA of 1988 by the House and Senate, several statements were relevant.¹⁷⁰

New Section 402 is entitled “General federal Assistance.” This section provides the President with authority to direct any federal agency to use its authorities and the resources granted to it under federal law in support of State and local assistance efforts. This assistance may include personnel, equipment, supplies, facilities, and managerial, technical and advisory services. The President may also coordinate all disaster relief assistance including voluntary assistance, provide technical and advisory assistance to affected State and local governments, and assist State and local governments in distribution of medicine, food, and other consumable supplies.

New Section 403 is entitled “Essential Assistance.” This section authorizes federal agencies on the direction of the President to provide assistance essential to meeting immediate threats to life and property resulting from a major disaster by using, lending, or donating to federal, State and local governments federal equipment, supplies, facilities,

¹⁶⁶ *Disaster Relief and Emergency Assistance Amendments of 1988*, Public Law 101–70; 102 Stat. 4689.

¹⁶⁷ *Robert T. Stafford Disaster Relief and Emergency Assistance Act*.

¹⁶⁸ See 42 U.S.C. § 5122.

¹⁶⁹ See U.S. Senate, *Disaster Relief Amendments of 1988, Report of the Committee on Environment and Public Works to Accompany S. 2380*, S. Rept 100–524, 1988, 11.

¹⁷⁰ *Disaster Relief and Great Lakes Erosion Assistance Report [To accompany H.R. 2707]*, House of Representatives, Report 100–517, March 15, 1988 and *Disaster Relief Act Amendments of 1988, Report of the Committee on Environment and Public Works United States Senate to accompany S. 2380*, Report 100–524, September 22, 1988. It is noted that the House bill, as amended, became the bill that was passed.

personnel and other resources, other than the extension of credit, for use or distribution by such governments in accordance with the purposes of the Act.¹⁷¹

New Section 502, “federal Emergency Assistance,” authorizes the President to direct any federal agency, with or without reimbursement, to use its authorities and the resources granted to it under federal law in support of State and local emergency efforts to save lives, protect property and public and safety, and lessen or avert the threat of a catastrophe. The President may also coordinate all disaster relief assistance, provide technical and advisory assistance to affected State and local governments, provide emergency assistance through federal agencies without cost, remove debris in accordance with Section 407, provide temporary housing assistance under Section 408, and assist State and local governments in the distribution of medicine, food and other consumable supplies.¹⁷²

In addition, in the Senate report:

The new title V is comprised of three sections. Section 501 provides emergency declaration procedures. Section 502 gives the President authority (1) to direct federal agencies to do work under their own authorities, without reimbursement; (2) to coordinate federal agencies and voluntary relief organizations providing emergency assistance, (3) to coordinate emergency assistance with State and local officials, and (4) to provide technical and advisory assistance to State and local governments.¹⁷³

Following a declaration, under authority of section 502, the President may (a) direct any federal agency to provide emergency assistance under its own authorities with or without reimbursement from funds appropriated to carry out this Act; (b) coordinate federal agency and voluntary relief organization assistance and coordinate with State and local officials; (c) provide technical and advisory assistance to affected State and local governments.¹⁷⁴

¹⁷¹ See *U.S. House of Representatives, Disaster Relief and Great Lakes Erosion Assistance, Report 100–517, 1988*, 7.

¹⁷² *Ibid.*, 12.

¹⁷³ *U.S. Senate, Disaster Relief Amendments of 1988, Report of the Committee on Environment and Public Works to Accompany S. 2380*, 9. Obviously, “without reimbursement” was changed in the final bill to the current language allowing reimbursement.

¹⁷⁴ *Ibid.*

SECTION 7-CHANGES TO TITLE III

Section 7 deletes sections 301, 305, 306 and the first two sentences of section 302(a), while retaining the authority to have work done by other federal agencies with or without reimbursement.¹⁷⁵

In a trend dating back to the DRA of 1970, Congress continued to expand the language allowing for the reimbursement of federal agencies while executing the successive disaster relief acts. This expansion can be seen with the additional language added to Section 402 of the Stafford Act, which now clearly showed what had been Section 203(f) of the DRA of 1970, Section 302(a) of the DRA of 1974, and now, Section 402 of the Stafford Act did in fact provide authority for federal agencies to be “reimbursed with or without reimbursement” for work they were directed to perform under the meta-authority of Section 402. Coupled with the second sentence of Section 304 of the Stafford Act, these reimbursements could be returned to the appropriated funds used to fund the work directed under Section 402, even though such work might have been performed under authorities independent of the Stafford Act, but subject to coordination of the FCO. Reimbursement would only apply to the types of life saving and life preserving work found in the Stafford Act, such as that found in Sections 403,407 and 408 of the Stafford Act. See the following.

- 42 U.S.C. § 5170(a) (2): In any major disaster, the President may coordinate all disaster relief assistance (including voluntary assistance) provided by federal agencies, private organizations, and state and local governments, including precautionary evacuations and recovery
- 42 U.S.C. § 5143(b)(3): Functions of federal coordinating officer—To effectuate the purposes of this Act, the federal coordinating officer, within the affected area, shall coordinate the administration of relief, including activities of the state and local governments, the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief or disaster assistance organizations, which agree to operate under his advice or direction...
- 44 CFR 206.5(d): Disaster assistance by other federal agencies is subject to the coordination of the FCO. Federal agencies shall provide any reports or information about disaster assistance rendered under the provisions of these regulations or authorities independent of the Stafford Act, that the

¹⁷⁵ U.S. Senate, *Disaster Relief Amendments of 1988, Report of the Committee on Environment and Public Works to Accompany S. 2380*, 11.

- FCO or Regional Administrator considers necessary and requests from the agencies,
- 44 CFR 206.42(a)(3): Coordinate the administration of relief, including activities of state and local governments, activities of federal agencies, and those of the American Red Cross, the Salvation Army, the Mennonite Disaster Service, and other voluntary relief organizations that agree to operate under the FCO's advice and direction.

This steady expansion of authority could explain why Congress inserted the words “its authorities” into Section 402 to clarify this position; that FEMA could utilize both the physical assets of other federal agencies, but also marshal their authority. By substituting “authority” for the word, “available,” Congress could have indicated its intent to allow for reimbursement.

H. REGULATIONS UNDER THE STAFFORD ACT

However, Congress’s intent once again was not reciprocated with a change in the regulations that allowed for the reimbursement of federal agencies when providing disaster assistance once directed under the authority of the Stafford Act. The two relevant regulations, which were updated on May 22, 1989 in the wake of the Stafford Act, have remained unchanged since that date.¹⁷⁶ The one significant change can be found at 44 CFR 206.8(b) where previously reimbursement would not be approved for “work under an agency’s own authority” was changed to “costs incurred while performing work pursuant to *disaster assistance authorities independent* of the Stafford Act.”

No stated reason appears in either the interim or final rule as to why FEMA substituted that language. However, it could be read that it did reduce the authorities that would not be reimbursed from all authorities of federal agencies to just their disaster assistance authorities. But if the view previously set forth that when FEMA directs a federal agency to perform work under that agency’s inherent authority in Section 402 is taken, the authority for the work is no longer the directed agency’s own authority but that of Section 402, this distinction is rendered irrelevant.

¹⁷⁶ 54 FR 22162. This was the interim rule. The final rule was issued on January 23, 1990 at 55 FR 2284.

Why the discrepancy then between what Congress provided in the law and what FEMA restricts itself to? A clue may appear in some of the statements that accompanied the first interim rules issued by FEMA after the Stafford Act was passed.

Although virtually identical legislation was proposed in several bills during the 1980s, the provisions did not become law until passage of the Disaster Relief and Emergency Assistance Amendments of 1988, Pub. L. 100-707. Nevertheless, the legislative history leading to the enactment of Pub. L. 100-707 indicates a clear *Congressional intent to authorize a much more limited range of federal assistance in response to “emergencies” than in response to “major disasters.”*¹⁷⁷

Title V of the Act indicates a clear Congressional intent that the resources and authorities of other federal agencies will be utilized first. Only if such authorities and resources are inadequate to meet immediate emergency needs will FEMA implement emergency assistance programs under the Act. Prior to enactment of Pub. L. 100-707, discussions in both the Senate and the House of Representatives indicate the clear intent that Stafford Act emergency declarations should not be used to override other federal response mechanisms already in place.¹⁷⁸

Likewise, a[t] page 4 in S. Rpt. No. 100-524 (September 7, 1988), which accompanied S. 2380, 100th Cong., 2d Sess., the Committee on Environment and Public Works of the United States Senate stated: *In any emergency the President must first invoke other federal authorities available to him to meet the crisis. If there are other authorities, the role of the federal Emergency Management Agency would be limited to providing technical assistance and coordinating the efforts of other federal agencies under authorities granted to them under other federal acts. Only after a determination that assistance under other federal authorities is inadequate to meet the crisis may FEMA directly intervene.*¹⁷⁹

Much of Congress's discussion during the legislative history of the DREAA of 1988 focused on limiting FEMA's role to appropriate events.¹⁸⁰ FEMA may have been mistaken by carrying over its focus on the declaration process for a major disaster or

¹⁷⁷ 54 FR 22162 Subpart B(3).

¹⁷⁸ Ibid at Subpart C(2).

¹⁷⁹ Ibid.

¹⁸⁰ See generally Senate Report 100-524; House Report 100-517, 134 Cong Rec H 938, March 17, 1988; 134 Cong Rec H 10840, October 21, 1988; 134 Cong Rec S 17137, October 21, 1988; and 124 Cong Rec S 172333, October 21, 1988.

emergency, when it was clearly the Congress' intent not to duplicate existing federal authorities that could handle the event on their own to the coordination and direction of federal agencies after a declaration. Once the facts justified a declaration, i.e., the event was of such magnitude that it deserved to trigger a declaration under the Stafford Act, Congress did not intend to continue to institute a wall between the Stafford Act and non-Stafford Act authorities. To the contrary, Section 402 clearly serves to coordinate both FEMA, exercising its Stafford authority, and federal agencies, exercising their non-Stafford authorities under the FCO. If this is the case, then FEMA's current prohibition against reimbursing federal agencies for "work pursuant to disaster assistance authorities independent of the Stafford Act" is a matter of policy, not a matter of law. In addition, the person coordinating federal assistance delivered through the Stafford Act has the authority to both coordinate and direct the federal agencies responding to an event that results in a declaration under the Act. Also included is the ability to reimburse those federal agencies directed, pursuant to the authority found in sections 402 and 502 of the Stafford Act, to engage in activities they might have already been authorized to do and for which they already had funding, or for which, they may seek additional funding.¹⁸¹

I. MAXIMIZING THE LATENT FLEXIBILITY OF THE STAFFORD ACT TO DIRECT AND REIMBURSE FEDERAL AGENCIES

The ability to reimburse federal agencies directed to perform work under the Stafford Act significantly increases the efficiency of the federal response to an existential catastrophe in three ways. First, it provides a "carrot" to federal agencies to respond to direction from the person vested with the power to direct federal agencies under the Stafford Act. Second, it removes the ambiguity of whether federal agencies, none of which it can be safely reasoned, are funded to the extent necessary to respond to an existential catastrophe, may not respond because of the fear they may quickly extinguish existing funds.¹⁸² Third, it increases the fiscal efficiency of the federal response by allowing disparate federal programs responding to an existential catastrophe to compete

¹⁸¹ See Appendix E for a graphic depicting the continuity of certain statutes from the DRA of 1950 through the Stafford Act.

¹⁸² While the DRF is not a limitless fund, it has been consistently funded to necessary levels by Congress.

for the same dollar based upon their priority.¹⁸³ In other words, with limited funds available, an EPA project would now compete in priority with the cost to evacuate citizens or to make emergency repairs to local transportation systems. According to the manner in which disaster funds are appropriated currently, each of those actions would likely be funded by separate appropriations in an uncoordinated manner not necessarily reflective of their priority. This lack of coordination can result in Congress appropriating funds for one action that might have been better used funding another part of the response.

This change in funding federal agencies responding to an existential catastrophe could also find additional efficiencies to assist in the prioritization of limited capabilities, including available funds, if accompanied by a way for the federal government to compete mission assignments amongst all primary and supporting Emergency ESFs. FEMA currently does not have a process to “bid” out the work amongst federal agencies necessary to respond to requests for assistance from states. Instead, FEMA relies almost entirely upon the primary agencies for each ESF to execute MAs. The federal government does not fully utilize its ESF supporting agencies, and even among primary agencies, nearly all their MAs end up going to those in uniform; the DoD and the U.S. Army Corps of Engineers (USACE), and the USCG.¹⁸⁴ The first step to ending this evisceration of a real Whole of Government approach would be to execute the Congressional mandate to inventory federal response capabilities as required under 6 U.S.C. § 751. Once these capabilities were identified, each one would be the subject of a PSMA that could quickly order them to action.¹⁸⁵

¹⁸³ See the United States Senate Committee on Appropriations Disaster Assistance Supplemental legislation for Hurricane Sandy where multiple federal agencies have sought individual reimbursement after funds have been expended. While Congress may wish to maintain such control, rather than ceding it to the Executive Branch, the current method is unable to provide real time prioritization of funds and could result in agencies not performing work that should be done, under fear Congress will not later reimburse it, or perform work Congress would not have wanted done but feels compelled later to reimburse.

¹⁸⁴ Author’s review of historical MAs using FEMA records dating back to Hurricane Katrina and discussions with FEMA MA staff. This review occurred prior to Hurricane Sandy and does not reflect FEMA’s response to that disaster.

¹⁸⁵ See 6 U.S.C. § 753(c) To expedite the provision of assistance under the National Response Plan (NRP), the President shall ensure that the Administrator, in coordination with federal agencies with responsibilities under the National Response Plan, develops prescribed mission assignments, including logistics, communications, mass care, health services, and public safety.

The purpose of this history and analysis of the federal Disaster Relief Acts and their implementing regulations was to provide evidence that the law, as it currently exists, supports unity of command under the Stafford Act. Specifically, it shows the ability to mobilize, coordinate, and direct federal agencies under the Stafford Act is not divorced from the ability to reimburse them, even for those agencies that could have engaged in those activities under their inherent authority. It also attempts to explain how current practice and regulations, which would impede unity of command by preventing the reimbursement of federal agencies for work they could have performed under their own authority, may have come about.

J. THE ADOPTION OF THE NATIONAL INCIDENT MANAGEMENT SYSTEM, THE INCIDENT COMMAND SYSTEM, AND THE MULTIAGENCY COORDINATION SYSTEM

The nation's response to disasters is organized under the NIMS, which includes the ICS and MACS. The NIMS was created when President Bush issued Homeland Security Presidential Directive (HSPD)-5 on February 28, 2003, which stated in part:

The [DHS] Secretary shall develop, submit for review to the Homeland Security Council, and administer a National Incident Management System (NIMS). This system will provide a consistent nationwide approach for federal, State, and local governments to work effectively and efficiently together to prepare for, respond to, and recover from domestic incidents, regardless of cause, size, or complexity. To provide for interoperability and compatibility among federal, State, and local capabilities, the NIMS will include a core set of concepts, principles, terminology, and technologies covering the incident command system; multi-agency coordination systems; unified command; training; identification and management of resources (including systems for classifying types of resources); qualifications and certification; and the collection, tracking, and reporting of incident information and incident resources.

NIMS was based on an earlier system, the National Interagency Incident Management System (NIIMS), which was developed in the 1970s to respond to the difficulties of fighting multi-jurisdictional wildfires in the American West. The NIIMS

was accepted by the National Wildfire Coordinating Group in 1982 and was centered on the organizing protocol of the FIRESCOPE Incident Command System.¹⁸⁶ FEMA's website carries a more detailed history of ICS.¹⁸⁷

The California Department of Forestry and Fire Protection, the Governor's Office of Emergency Services; the Los Angeles, Ventura and Santa Barbara County Fire Departments; and the Los Angeles City Fire Department joined with the U.S. Forest Service to develop the system. This system became known as FIRESCOPE (FIrefighting RESources of California Organized for Potential Emergencies).¹⁸⁸

The important distinction between NIIMS/NIMS and ICS is that NIMS, and the NIIMS before it, are broader in concept and scope than ICS. NIMS "represents a core set of doctrines, concepts, principles, terminology, and organizational processes that enables effective, efficient, and collaborative incident management."¹⁸⁹ NIMS has five components: preparedness, communications and information, resource management, command and management, and ongoing management and maintenance.¹⁹⁰ ICS is a subset of command and management alongside MACS and public information.¹⁹¹ ICS is used to organize on-scene operations for a broad spectrum of emergencies from small to complex incidents, both natural and manmade. The field response level is comprised of emergency management/response personnel, under the command of an appropriate authority, who execute tactical decisions and activities in direct response to an incident or threat. Resources from the federal, state, tribal, or local levels, when appropriately deployed, become part of the field ICS as prescribed by the local authority.¹⁹²

¹⁸⁶ Claire B. Rubin, *Emergency Management: The American Experience 1900–2010*, 2nd ed. (Taylor & Francis, 2012), 167.

¹⁸⁷ FEMA, "NIMS and the Incident Command System" (n.d.), http://www.fema.gov/txt/nims/nims_ics_position_paper.txt.

¹⁸⁸ Ibid.

¹⁸⁹ *National Incident Management System (NIMS)*, 3.

¹⁹⁰ Ibid., 7–8.

¹⁹¹ Ibid., 45.

¹⁹² Ibid., 46.

Command of an incident under ICS can occur under either a single incident commander, or if multiple agencies have jurisdiction over the incident through unified command. Unified command can be described as

... a team effort, UC allows all agencies with jurisdictional authority or functional responsibility for the incident to jointly provide management direction through a common set of incident objectives and strategies and a single IAP. Each participating agency maintains its authority, responsibility, and accountability.¹⁹³

Under unified command, no single jurisdiction can control the actions of the other; decisions are made by consensus and actions are coordinated amongst the participants. This situation makes sense given that the firefighting efforts that gave birth to ICS required multiple jurisdictions from local, state and the federal governments to all participate with their overlapping authority for these fires.

When an incident is of such a magnitude that additional support is required above the field level, MACS was created to manage and coordinate these processes.

The primary function of MACS is to coordinate activities above the field level and to prioritize the incident demands for critical or competing resources, thereby assisting the coordination of the operations in the field. MACS consists of a combination of elements: personnel, procedures, protocols, business practices, and communications integrated into a common system. For the purpose of coordinating resources and support between multiple jurisdictions, MACS can be implemented from a fixed facility or by other arrangements outlined within the system.¹⁹⁴

Unlike ICS, when depending on the type or location of an incident, either a single incident commander or a unified command could be on scene, MACS, through a MAC Group, always supposes multiple jurisdictions or agencies of essentially co-equal footing.

¹⁹³ *National Incident Management System (NIMS)*, 50.

¹⁹⁴ *Ibid.*, 64.

Typically, Agency Administrators/Executives, or their designees, who are authorized to represent or commit agency resources and funds are brought together to form MAC Groups. MAC Groups may also be known as multiagency committees, emergency management committees, or as otherwise defined by the system.¹⁹⁵

The primary functions performed by MAC groups are expected to be situation assessment, incident priority determination, critical resource acquisition and allocation, support for relevant incident management policies and interagency activities, coordination with other MACS elements, as well as with elected and appointed officials and of summary information.¹⁹⁶ This situation aligns with the definition of what is considered “operational” for the purposes of this thesis.

During an existential catastrophe, federal incident support to the supported state would occur at the Joint Field Office (JFO).¹⁹⁷

The JFO is the primary federal incident management field structure. The JFO is a temporary federal facility that provides a central location for the coordination of federal, State, tribal, and local governments and private-sector and nongovernmental organizations with primary responsibility for response and recovery. The JFO structure is organized, staffed, and managed in a manner consistent with *NIMS* principles and is led by the Unified Coordination Group. Although the JFO uses an ICS structure, the JFO does not manage on-scene operations. Instead, the JFO focuses on providing support to on-scene efforts and conducting broader support operations that may extend beyond the incident site.¹⁹⁸

The JFO provides a forum where federal, state, tribal and local governments, alongside key members of the private sector and non-governmental organizations, through executing basic MACS functions, can support incident commands. The JFO is led through its Unified Coordination Group (UCG). Within the UCG, the FCO is the primary

¹⁹⁵ *National Incident Management System (NIMS)*, 67.

¹⁹⁶ Ibid., 67–69.

¹⁹⁷ For larger events, a JFO can support Area Field Offices (AFOs) that perform the same function but closer to its supported incident commands.

¹⁹⁸ *National Incident Management System (NIMS)*, 141.

federal official responsible for coordinating, integrating, and synchronizing federal response activities.¹⁹⁹ To the extent it applies, the UCG follows the principle of unified command.²⁰⁰

State Coordinating Officers (SCOs), the state counterpart to the FCO, are not subject to the orders of federal officials and neither are the resources of state governments. As discussed previously, the Stafford Act also does not provide authority over federal military forces or over the law enforcement and arrest powers of federal law enforcement agencies.²⁰¹ The FCO, normally a member of FEMA, does not in practice control the efforts of any of the other federal agencies. No final dispute resolution is available amongst federal agencies at the JFO other than to forward disputes or questions to higher officials. Therefore, the FCO, under current practice, coordinates the actions of the UCG, but has no authority to force the resolution of disputes amongst federal civilian agencies, federal military forces, or federal law enforcement agencies.²⁰²

Thus, the concept of unified command, a Constitutional requirement among federal to state relations,²⁰³ and a legal requirement for relationships with federal military forces and federal law enforcement agencies, has also carried over to the relationships between the remaining federal agencies. Instead of having a UCG consisting of a FCO,

¹⁹⁹ *National Response Framework*, 64. The FCO, which will be discussed later, receives their primary authority directly from the Stafford Act.

²⁰⁰ *National Response Framework*, 52.

²⁰¹ Each of these two entities may have separate coordination groups. When a terrorist threat or incident and investigative and intelligence activities occurs, the Federal Bureau of Investigation (FBI) may establish a Joint Operation Center to coordinate those activities. In addition, a Joint Information Center (JIC) may be established to coordinate and disseminate information under ESF #15, which is led by DHS. See NRF, 65 and the NRF ESF #15 Annex.

²⁰² It is arguable that the FCO has some authority over federal law enforcement agencies to the extent they may be tasked to engage in non-law enforcement activities, e.g., using U.S. Marshals to sandbag a levy rather than engage in actual law enforcement activities. However, given the dramatic effect this could hypothetically have on law enforcement agencies of being able to enforce federal law and provide security, this thesis does not argue the FCO could have authority over federal law enforcement and that the relationship remains on par with federal military forces.

²⁰³ See the 10th Amendment to the Constitution. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

SCO,²⁰⁴ Senior Federal Law Enforcement Official (SFLEO), and a senior federal military officer who amongst them have complete decisional authority, every additional federal agency involved in providing disaster assistance must be added to reach a complete unified command. This problem has likely been hidden from view because the federal government response to disasters in practice mainly restricts itself to a handful of ESF primary agencies. Thus, the legacy of ICS and NIMS from its firefighting roots has carried over to the relationships among federal agencies when engaged in providing federal disaster relief authorized by, or coordinated under, the Stafford Act. Quite simply no one is in charge.

K. THE FEDERAL RESPONSE PLANS AND FRAMEWORKS

The history of national FRPs goes back as least as far as the Federal Civil Defense Act of 1950. The current national response plan, the NRF,²⁰⁵ directly descended from three prior plans, the NRP, which was in effect during Hurricane Katrina, the FRP, which was issued just prior to Hurricane Andrew, and the Earthquake Response Plan, which evolved, into the Natural Hazards Response Plan.²⁰⁶ The latter plans were required by the Earthquake Hazards Reduction Act of 1977. The FRP found its statutory basis in the Stafford Act, and the NRP in both the Stafford Act and the Homeland Security Act.²⁰⁷ However, the FRP or NRP always coexisted amongst other federal plans, their interface never quite clear. For instance, the book, *Emergency Management: The American*

²⁰⁴ Each state has the ability, on its own terms, to determine whether it can provide the SCO with authority over local responders, state law enforcement officers, and its National Guard. It is quite possible a SCO will face the same issues of the FCO, and by state law, may not have authority over state and local responders and resources. In other words, those additional jurisdictions will need to be represented to ensure a true unified command.

²⁰⁵ The NRF has been in the process of being updated for over a year, however, no timetable for the release of the newest version has been released. It will also be supported by a nation Federal Interagency Operational Plan, tentatively named the FIOP-R.

²⁰⁶ William R. Cumming, "January 24, 1991 Stickney Memorandum on FEMA's Response Readiness," *ASDA Newsletter* 33, no. 3 (May–June 2003), <http://www.google.com/url?sa=t&rct=j&q=natural%20hazards%20response%20plan%20cummings&source=web&cd=2&ved=0CDYQFjAB&url=http%3A%2F%2Ftraining.fema.gov%2FEMIweb%2Fedu%2Fdocs%2FCumming%2C%2520William%2520R.%2520%2520ASDA%2520Newsletter.%2520%2520June%25202003.doc&ei=dOSCUb68NoWs9ASr5oGwAQ&usg=AFQjCNEQdKYOJdL9AWraaRmh70a8OyOCpA&bvm=bv.45960087,d.eWU&cad=rja>. See also the federal response to a *Catastrophic Earthquake, Final Proposed Plan* 51 FR 23624, June 30, 1986.

²⁰⁷ Ibid.

Experience 1900–2010, details six different national plans or systems in place, including the FRP, in 2001,²⁰⁸ which included plans for environmental disasters, wildfires, biohazards, terrorist attack, and a nuclear or radiological release. In addition, the national federal plan often had additional annexes. For instance, the NRP was accompanied by a CIA, which was itself the parent document for the CIS.²⁰⁹

The NRP CIS (described in the CIA) addresses resource and procedural implications of catastrophic events to ensure the rapid and efficient delivery of resources and assets, including special teams, equipment, and supplies that provide critical lifesaving support and incident containment capabilities. These assets may be so specialized or costly that they are either not available or are in insufficient quantities in most localities. The procedures outlined in the NRP CIS are based on the following.

- The pre-identification of federal assets and capabilities;
- The strategic location of pre-identified assets for rapid deployment; and
- The use of prescribed MAs for Stafford Act declarations, or individual agency authority and funding, to expedite deployment upon notification by DHS (in accordance with procedures established in the NRP CIS) of a potential catastrophic event.

In both Hurricanes Andrew and Katrina, the national plans were criticized, partly because of the overreliance on them.²¹⁰ The House report, *Hurricane Katrina A Failure of Initiative*, summarizes it best.

Of all we found along the timeline running from the fictional Hurricane Pam to the tragically real devastation along the Gulf coast, this conclusion stands out: A National Response Plan is not enough.

What's needed is a National Action Plan. Not a plan that says Washington will do everything, but one that says, when all else fails, the federal government must do something, whether it's formally requested or not.

²⁰⁸ Cumming, “January 24, 1991 Stickney Memorandum on FEMA’s Response Readiness.”; See also the federal response to a *Catastrophic Earthquake, Final Proposed Plan* 51 FR 23624.

²⁰⁹ See *National Response Plan (NRP)*, December 2004, 44.

²¹⁰ See U.S. Government Accounting Office, *Disaster Management Improving the Nation’s Response to Catastrophic Disasters* for Hurricane Andrew and the House bipartisan report on Hurricane Katrina, *Failure of Initiative*.

Not even the perfect bureaucratic storm of flaws and failures can wash away the fundamental governmental responsibility to protect public health and safety.

This fixation on executing the national “plan” even reached down to state emergency managers.

[Colonel Jeff] Smith, LOHSEP Deputy Director for Emergency Preparedness, believed, “the biggest single failure of the federal response was the Department of Homeland Security’s failure to recognize that Katrina was a catastrophic event and implement the catastrophic incident annex to the National Response Plan...Had DHS recognized Katrina for the event that it was, a truly catastrophic event, had DHS implemented the catastrophic incident annex to the NRP, Louisiana should have had a significant number of federal troops and federal assets, days prior to their actual arrival. . . . Instead federal troops did not arrive in number until Saturday, after the evacuations of the Superdome, Convention Center and cloverleaf were complete.”

Compare what Colonel Smith said with what FEMA Director Mike Brown stated on a FEMA Video Teleconference (VTC), on Sunday, August 28, 2005, the day before Hurricane Katrina made landfall in Louisiana.

On Sunday, Secretary Chertoff participated in the FEMA VTC. He heard assurances from then-FEMA Director Michael Brown and others that preparations were well in hand. For instance, Brown told attendees on the conference call “I want that supply chain jammed up as much as possible. ... Just keep jamming those lines full as much as you can with commodities” and “get to the edge of the envelope ... if you feel like you [missing] go ahead and do it. I’ll figure out some way to justify it.²¹¹

The “plan” that Colonel Smith in retrospect wanted to see executed, the same one that Director Brown would be relying upon to “jam supply chains” was not yet completed. An alternative method to perform the needed actions would need to be found. This gap could be filled by a federal unity of command that communicated through the concept of

²¹¹ U.S. Senate, *Hurricane Katrina: A Nation Still Unprepared, Special Report of the Committee on Homeland Security and Governmental Affairs*, 164.

Commander's Intent,²¹² could fill the gaps not covered under current planning, and close the period in time between the occurrence of an existential catastrophe and the delivery of significant federal assistance.

The current national plan, the NRF, replaced the NRP in 2008. It sought to temper this overreliance on the national plan as a “cure all” by redesignating itself as a framework and calling itself a guide, not a plan.²¹³ The NRF, however, is now being updated and is scheduled to be replaced sometime in 2013. It will be supported by a FIOP-R required by both PPD-8 National Preparedness, and by the National Preparedness System found in the Homeland Security Act.²¹⁴

The move to a framework, however, may still not solve one fundamental misconception about any national plan, that it is an *authority* in itself. None of these national plans was issued through procedures required under the Administrative Procedures Act.²¹⁵ While the law may call for such a plan²¹⁶, it should not be confused with the law, which is problematic in that the highest level documents calling for very basic federal emergency management structures, such as the ESFs, JFOs and ICS, are the NRF and NIMS, neither of which have force of law. Even Professor John Harrald, in his chapter in *Emergency Management: The American Experience 1900–2010* says, “For example, the Coast Guard, EPA, and FEMA had worked out a protocol to *link the FRP and NCP authorities* when oil spill response efforts occurred ...”²¹⁷ Professor Harrald misconstrues that both these plans are authorities when the FRP is not, although at least the NCP does appear in federal regulations.²¹⁸ It does not appear the FRP ever became a

²¹² See Milan Vego, “Operational Commander’s Intent,” *Joint Forces Quarterly*, no. 57 (2d Quarter 2010): 138–144 for a thorough discussion of the concept of commander’s intent; also *Army Doctrine Publication 6–0 Mission Command*, May 2012.

²¹³ *National Response Framework*, 1.

²¹⁴ See 6 USC § 753. The statute requires each federal agency with responsibilities under the NRP, in reality the NRF, to develop “deliberate operational plans and corresponding capabilities.” The FIOP-R would fill the gap between the NRF and these individual agency operational plans.

²¹⁵ Banks, “The Legal Landscape for Emergency Management in the United States, New America Foundation,” 20. In addition, Banks points out that the NIMS is also not a regulation.

²¹⁶ See 6 U.S.C. § 314(a)(13) and 319.

²¹⁷ Rubin, *Emergency Management: The American Experience 1900–2010*, Taylor & Francis, 2012.

²¹⁸ 40 CFR 300 National Oil and Hazardous Substances Pollution Contingency Plan.

regulation. The supporting ESF structure is even less grounded. It is not found in any law or regulation but is simply a product of internal federal planning that first appeared as 11 ESFs found in the Earthquake Response Plan issued in 1986.²¹⁹

With the issuance of these plans, however, the federal response has become increasingly wedded to the actions or structures called for in these documents. As these plans become more detailed, such as in the case of the CIS, they have decreased initiative as people wait for these plans to put into action. Recall the earlier quote from LOHSEP Deputy Director Smith waiting on the CIA to be executed?; an incredible example of the death of initiative. Why? The CIS, without which the CIA could not be executed, was not released until September 2006, a year after Hurricane Katrina.²²⁰ Emergency managers were so transfixed on having a plan to answer everything that they failed to do, in some cases, anything. These plans, lacking a strong foundation, focus, or direction in law or regulation, have become an increasing drag upon the federal response. While the plans may become larger and more detailed, they continue to lack specificity, or even better, provide the authority for the decentralized initiative necessary to preemptively address the priority of resources and interagency disputes. For instance, there is no current version of the CIS and the FIOP-R may not necessarily fill this need when it is issued. Regardless of whether a new CIS is created, without the preparation of an inventory of federal response capabilities, these plans will be at best incomplete since they will not be able to reflect the full range of federal capabilities. They also lack an operational adjudication system.

There are two forums that currently exist that might form the basis of such an operational adjudication forum, the ESFLG and the Domestic Resilience Group (DRG), operating under the auspices of PPD-1 and the National Security Staff (NSS). However, these bodies are set up to adjudicate interagency policy disputes, not necessarily to make operational decisions, which require time sensitive decisions. For instance, the ESFLG was not formally utilized during Hurricane Sandy. In addition, the author has not even been able to determine if the charter under which the ESFLG operates has ever been

²¹⁹ 51 FR 23624, June 30, 1986.

²²⁰ See footnotes 91–92.

signed by its member agencies, further weakening its power, though it operates through assumed interagency cooperation. Currently, no clear operational link exists between the president and the FEMA National Response Coordination Center (NRCC), which is functionally the highest-level federal operational coordination center for federal disaster coordination.

L. THE DISTINCTION BETWEEN CRISIS AND CONSEQUENCE MANAGEMENT

Another change in the last two decades of federal emergency management has been the consolidation of crisis and consequence management. These terms appeared in the 1990s in response to the growing threat of terrorism. Different federal agencies had different internal definitions for these terms,²²¹ but the FRP of 1999 defined them as follows.

Responding to terrorism involves instruments that provide crisis management and consequence management. “Crisis management” refers to measures to identify, acquire, and plan the use of resources needed to anticipate, prevent, and/or resolve a threat or act of terrorism. The federal Government exercises primary authority to prevent, preempt, and terminate threats or acts of terrorism and to apprehend and prosecute the perpetrators; State and local governments provide assistance as required. Crisis management is predominantly a law enforcement response.

“Consequence management” refers to measures to protect public health and safety, restore essential government services, and provide emergency relief to governments, businesses, and individuals affected by the consequences of terrorism. State and local governments exercise primary authority to respond to the consequences of terrorism; the federal Government provides assistance as required. Consequence management is generally a multifunction response coordinated by emergency management.

²²¹ See Scott R. Taylor, Amy Rowe, and Brian M. Lewis, Consequence Management, In Need of a Timeout, *Joint Forces Quarterly*, Summer 1999, 78–85.

Along with the FRP, in 1995, President Clinton issued PDD-39, which set forth U.S. policy for counterterrorism.²²² PDD-39 followed a “lead agency” model under which the federal agency having primary jurisdiction or subject matter expertise led the federal response. Under PDD-39 and the Terrorism Incident Annex to the FRP published in 1997, the FBI was the lead federal agency for threats or acts of terrorism during a terrorist incident in the United States. FEMA would support the FBI as the lead agency until the Attorney General would shift responsibility to FEMA as the lead federal agency. This system considered the FBI had the unique authorities and skills to disrupt and terminate a terrorist attack on the United States while acknowledging FEMA was best suited to lead the federal response in the aftermath. The implied premise was the most important action was to end the terrorist threat, especially if it was an attack using weapons of mass destruction (WMD). However, both PDD-39 and the Terrorism Annex to the FRP agreed that a single federal agency would be in charge of the incident at any one time.

The distinction between consequence and crisis management was terminated with the issuance of HSPD-5 in 2003.

Even more significant changes occurred in early 2003 with the passage of the Homeland Security Act of 2002, which established the Department of Homeland Security, and the President’s signing of Homeland Security Presidential Directive-5 (HSPD-5), which overhauled the federal approach to incident management. Replacing the bifurcated Presidential Decision Directive-39 framework with the single concept of “incident management,” HSPD-5 was meant to resolve the ambiguity of authority inherent in separated concepts of “crisis management” and “consequence management.” HSPD-5 designated the Secretary of Homeland Security as the “principal federal official for domestic incident management.” This means that the federal government can now always give the same answer to the “who’s in charge?” question in an incident of national significance.

²²² A copy of PDD-39 can be found at Federation of American Scientists, “PDD-39,” June 21, 1995, <http://www.fas.org/irp/offdocs/pdd39.htm>, and the terrorism incident annex to the FRP from 1997 at Federation of American Scientists, “Federal Emergency Management Agency, Federal Response Plan, Notice of Change,” February 7, 1997, http://www.fas.org/irp/offdocs/pdd39_frp.htm. PDD-39 was later reaffirmed by PDD-62 United States Policy on Counterterrorism. That document is classified but an abstract and press release may be found at Federation of American Scientists, “Fact Sheet,” May 22, 1998, <http://www.fas.org/irp/offdocs/pdd-62.htm>.

Over time, the Department of Homeland Security will evolve into more of an operational integrator for domestic incidents, in Washington and in the field, although the Secretary of Homeland Security will never be formally in charge of all the different entities involved in responding to domestic incidents.²²³

In Richard Falkenrath's view, despite the clear language of PDD-39 and the FRP to the contrary, the division of crisis and consequence management meant the federal government could not point to a single federal official in charge of a terrorism incident. He saw crisis and consequence management as a bifurcated rather than a linear process for command. By issuing HSPD-5, however, they extended the imposition of a single federal official, in the person of the DHS Secretary as the PFO, to all "domestic incidents," which includes "terrorist attacks, major disasters, and other emergencies," not just for the terrorist events covered under PDD-39.

However, the DHS Secretary does not have authority to direct non-DHS law enforcement assets when engaged in law enforcement activities, the foundation of crisis management, nor DoD forces, despite the fact these federal agencies have the primary responsibility to respond to terrorist events. The DHS secretary does have authority, although it has been delegated to the FEMA Administrator, over what was formerly called consequence management for both preparedness and response activities. Falkenrath may not have realized that the DHS Secretary had this authority.²²⁴ Presently, the FEMA Administrator, through delegation and inherent authorities granted under PKEMRA, presumably has the authority to direct agencies involved in what was formerly called consequence management. In addition, in PKEMRA, the FEMA Administrator was given the following authority now found in 6 U.S.C. § 313–314.²²⁵ If this authority exists to direct consequence management activities, it would provide the

²²³ Richard Falkenrath, "Problems of Preparedness: U.S. Readiness for a Domestic Terrorist Attack," *International Security* 25, no. 4 (Spring 2001): 147–186.

²²⁴ Ibid. "Over time, the Department of Homeland Security will evolve into more of an operational integrator for domestic incidents, in Washington and in the field, although the Secretary of Homeland Security will never be formally in charge of all the different entities involved in responding to domestic incidents."

²²⁵ See Appendix G.

legal foundation for unity of command for the federal operational response to an existential catastrophe.

M. EXECUTIVE ORDERS 12148 AND 12656 AND PRESIDENTIAL POLICY DIRECTIVE-8

These two EOs control which agencies in the federal government are in charge of executing the president's responsibilities under the Stafford Act and to prepare for national security emergencies.²²⁶ EO 12148 Federal Emergency Management conveys the authority to coordinate and direct federal agencies under the Stafford Act. EO 12656 Assignment of Emergency Preparedness Responsibilities assigns national security emergency preparedness responsibilities to federal agencies. Both EOs work in conjunction with PPD-8 National Preparedness.

With the creation of FEMA in 1979, President Carter issued several EOs, one of which was EO 12148. Crucially, in paragraph 4-203, it delegated the president's authority to execute the DRA of 1974, and coordinate and direct the federal response with three exceptions including the ability to declare disasters and emergencies, the authority to repair federal facilities and the authority relating to food coupons and surplus commodities. When the DRA of 1974 was amended and renamed, the Stafford Act in 1988, EO 12673 Delegation of Disaster Relief and Emergency Assistance Functions, revised EO 12148 to comply with the amended law without substantively changing paragraph 4-203. With the creation of DHS in 2003, EO 13286 Amendments of Executive Orders, and Other Actions, in Connection with the Transfer of Certain Functions to the Secretary of Homeland Security redelegated paragraph 4-203 to the DHS Secretary. These authorities continued to be practiced by FEMA even when it was folded into DHS in 2003.²²⁷ The DHS Secretary officially redelegated these authorities to the FEMA Administrator in December 2010.²²⁸

²²⁶ EO 2656 Sec. 101(a) ...A national security emergency is any occurrence, including natural disaster, military attack, technological emergency, or other emergency, that seriously degrades or seriously threatens the national security of the United States.

²²⁷ *Homeland Security Act of 2002*, Public Law 107–296.

²²⁸ DHS Delegation 9001.1 Delegation to the Administrator of the Federal Emergency Management Agency.

President Reagan signed EO 12656 in 1988. This EO defines a national security emergency as “any occurrence, including natural disaster, military attack, technological emergency, or other emergency, that seriously degrades or seriously threatens the national security of the United States.” In addition to requiring all federal agencies to be prepared to respond adequately to all national security emergencies, each federal agency is required to appoint a senior policy official as an emergency coordinator responsible for developing and maintaining a national security emergency preparedness plan. These plans should include programs to mobilize personnel, the possible use of alternative resources, share resources with other agencies, set priorities and allocate resources among civilian and military claimants, and identify occupations and skills for which a critical need may exist. The overall coordination and responsibility for these programs and plans was originally given to FEMA but were transferred to the DHS Secretary by EO 13286 in 2003. DHS Delegation 9001.1 gave this responsibility back to FEMA in 2010.

See EO 12656 Part 17-Department of Homeland Security Sec. 1701, Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Secretary of Homeland Security shall:

- (1) Coordinate and support the initiation, development, and implementation of national security emergency preparedness programs and plans among federal departments and agencies...

Sec. 1702. Support Responsibilities.

The Secretary of Homeland Security shall:

- (1) Support the heads of other federal departments and agencies in preparing plans and programs to discharge their national security emergency preparedness responsibilities, including, but not limited to, such programs as mobilization preparedness, continuity of government planning, and continuance of industry and infrastructure functions essential to national security...

President Obama signed PPD-8 in March 2011. It replaced HSPD-8 previously issued by President Bush in December, 2003. It directed the development of a National Preparedness Goal (NPG) that identifies the core capabilities necessary for preparedness and a National Preparedness System (NPS) to guide activities that will enable the nation

to achieve the goal. Its purpose includes defining the core capabilities necessary to prepare for the specific types of incidents that pose the greatest risk to the security of the nation. The DHS Secretary was assigned the responsibility to develop the NPG and it was issued in September 2011,

PPD-8 also required the creation of a NPS covering prevention, protection, mitigation, response, and recovery. Each framework requires the NPS to include an interagency operational plan to support it including a more detailed concept of operations, description of critical tasks and responsibilities, detailed resource, personnel, and sourcing requirements and specific provisions for the rapid integration of resources and personnel. It also requires all agencies with roles in the frameworks to develop department-level operational plans to support the interagency operational plans. The DHS Secretary was also assigned the responsibility to develop a description of the NPS and to coordinate the effort in creating it. The NPS description was issued in November 2011.

Interestingly, Congress, in the PKEMRA, ordered the creation of a NPS as part of a greater comprehensive preparedness system.²²⁹ Several differences occur between the NPS found in statute and described in PPD-8. First, Congress directed that the president execute the creation of the NPG and NPS through the FEMA Administrator.²³⁰ Instead, PPD-8 gave this responsibility to the DHS Secretary and both the NPS description and the NPG were issued by DHS, not FEMA, although both are found under the FEMA website and FEMA was intimately involved in its creation.²³¹ Second, the NPS set forth by Congress has a different set of components than those found in the NPS created by DHS.²³² Probably the most crucial of these are the federal response capability inventory

²²⁹ 6 U.S.C. §§ 741–754.

²³⁰ See 6 U.S.C. §§ 742–744. Also see 6 U.S.C. § 314(a)(19), which, when listing the responsibilities of the FEMA Administrator states, “assisting the President in carrying out the functions under the national preparedness goal and the national preparedness system and carrying out all functions and authorities of the Administrator under the national preparedness system.”

²³¹ <http://www.FEMA.gov>. PPD-8 did state within it that, “This directive shall be implemented consistent with relevant authorities, including the Post-Katrina Emergency Management Reform Act of 2006 and its assignment of responsibilities with respect to the Administrator of the federal Emergency Management Agency.”

²³² See 6 U.S.C. § 744.

and the Catastrophic Resource Report.²³³ Neither FEMA nor DHS has ever issued the federal response capability inventory. Only in August 2012 did FEMA provide its first Catastrophic Resource Report. The former was required by law to have been completed by the end of 2007 and the latter was to be issued annually since 2007. Strangely, FEMA never publically released the Catastrophic Resource Report and FEMA Protection and National Preparedness, which created the report, never distributed or fully coordinated it within FEMA.²³⁴ In addition, the document is strategic in nature and not of direct use for the operational level of federal response, although it could provide a structure for more detailed future operational planning efforts. While DHS did issue a National Preparedness Report in March 2012, it does not fulfill statutory requirements for the federal response capability inventory and the Catastrophic Resource Report nor provide details about what federal assets would be used in a catastrophic event nor estimate the resources required. In fact, no official federal standard exists of what constitutes a catastrophic event, which means no benchmark is available to which a set of capabilities can be matched. The closest government standard may be FEMA's "maximum of maximums."²³⁵

Currently, no set of federal capabilities is identified to address an event of this magnitude on their own or in conjunction with state resources as required by law, although the core capabilities being developed under PPD-8 could be expanded to focus on any future standard developed to define an existential catastrophe. Also, in other words, if the CIS was ever updated and reissued, it would not reflect a complete survey of federal capabilities to provide the most efficient federal response to a catastrophic incident, much less an existential catastrophe.

An efficient, capability-based federal planning effort would fulfill the Congressional mandate to create an inventory of federal capabilities and estimate the

²³³ 6 U.S.C. § 751 & 6 U.S.C. § 752(b).

²³⁴ The author only learned of the report in mid-August 2013, and it was never coordinated with FEMA's Response Directorate that would actually coordinate the employment of the resources found in the report. The only public reference to it is on Obsidian's website, a FEMA contractor, and also on one of Obsidian's employee's Linkedin accounts. Obsidian, "Strategic Preparedness Analysis and Reporting" (n.d.), <http://www.obsidiandc.com/project-summaries/strategic-preparedness-analysis-and-reporting/>.

²³⁵ See footnotes 31–32. FEMA, "2012 The State of FEMA."

shortfalls in responding to at least a MOM incident. Each one of those pre-identified capabilities could have a PSMA written for it to trigger its commitment to the disaster. Given the FEMA Administrator's goal of stabilizing the event within 72 hours, these capabilities could be organized into those that could be expected to deploy within 72 hours and those expected to require more than 72 hours to deploy.

N. FEDERAL INTERAGENCY COORDINATION GROUPS AND WHITE HOUSE SUPERVISION²³⁶

Since FEMA's creation in 1979, federal coordination has seen little stability in its connection to the White House and in senior federal interagency coordination groups. The FEMA IG Report, Federal Response Planning and Coordination, from September 1992 provides a short history of federal coordination structures up to that point. These early coordination structures included the Integrated Emergency Management System Concept (IEMS), the Integrated Emergency Coordination Structure (IECS), the National Emergency Response Structure (NERS) later re-titled the NSEC, and the FRP. From these attempts at disaster inter-agency coordination, the "functional group concept" remains in the form of the 15 ESFs that fall under the NRF. The attempts at federal interagency coordination in the 1980s and early 1990s reveals a trend that continued for the next two decades, namely that federal coordination at the operational level and higher remained ad hoc and subject to change. The result is that as in the case of FEMA, the EPA and Nuclear Regulatory Commission (NRC) in 1992, federal agencies could continue to disregard the federal interagency coordination processes in their planning, especially as no formal supervision of federal agency plans appeared to exist.²³⁷ As FEMA's IG Performance Audit after Hurricane Andrew explained "Since we found that this system [the NSEC] is still considered valid by some agencies (although disregarded by many) and it dealt specifically with the issue of Government-wide coordination, we

²³⁶ See also Appendix F Excerpt on FEMA's Response Coordination Structures 1979–1992 from the FEMA Inspector General Report Federal Response Planning and Coordination, September 1992.

²³⁷ See 6 U.S.C. § 753(c), which requires all federal agencies with responsibilities under the NRP to have operational plans and provides specific details of what must be included in those plans.

suggested that it be reconsidered.”²³⁸ FEMA vigorously denied this problem, but in its response, undercut its own argument when it stated:

While the report stated that the “... OIG concludes that these relationships are essential to FEMA’s mission and as prescribed by Executive Orders 12148, 12656 and the Stafford Act ...,” there is an implication that these functions are not already being performed or, if they are being performed, that there are specific problems that need to be remedied. Whether we are discussing day-to-day or emergency response operations, FEMA has extensive linkages with other federal agencies and the White House at all levels through wide varieties of forums, including interagency policy groups, interagency coordinating committees, the National Security Council, the Office of Management and Budget, and the Cabinet Affairs Office on virtually a daily basis, etc. The response operations relating to Hurricane Andrew have demonstrated the efficacy of many of these systems, including the *Catastrophic Disaster Response Group*.²³⁹

With so many groups operating independently of each other, it is no wonder difficulties harmonizing the federal response occurred.

With the formal adoption of the FRP in 1992, the Catastrophic Disaster Response Group (CDRG), which predated the NSEC, regained traction over the NSEC.²⁴⁰ According to the FRP:

The CDRG, composed of representatives from all FRP signatory departments and agencies, operates at the national level to provide guidance and policy direction on response coordination and operational issues arising from the FCO and ESF response activities. CDRG members are authorized to speak for their agencies at the national policy level. During a disaster the CDRG convenes as necessary, normally at FEMA Headquarters; the EST [Emergency Support Team] provides any needed support.²⁴¹

The CDRG was replaced by the IIMG after FEMA’s merger with DHS.²⁴² According to the NRP, the IIMG was to be activated by the DHS Secretary for high profile, large-scale

²³⁸ FEMA IG Performance Audit, January 14, 1993, 71–72.

²³⁹ Memorandum for Russell F. Miller from Antonio Lopez and Grant C. Peterson, “Draft Inspection Report: Federal Response Planning and Coordination,” September 11, 1992, <http://www.fas.org/irp/agency/dhs/fema/ig-response.pdf>, 7.

²⁴⁰ Carafano and Weitz, *Mismanaging Mayhem: How Washington Responds to Crisis*, 220.

²⁴¹ *Federal Response Plan (FRP)*, April 1999, 22.

²⁴² Carafano and Weitz, *Mismanaging Mayhem: How Washington Responds to Crisis*, 220.

events that present high-probability targets, such as NSSEs (National Security Special Events), and in heightened threat situations.²⁴³ Consisting of high level representatives of federal agencies and NGOs, its duties included serving as the focal point for federal strategic incident management planning and coordination, making recommendation to the DHS Secretary on operational courses of action, assessing national impacts of an incident, anticipating federal resource and operational requirements, and maintaining ongoing coordination between the PFO and JFO coordination groups.²⁴⁴ The IIMG was also to coordinate with and provide information to the White House.

The performance of the IIMG was widely criticized after Hurricane Katrina. Secretary Chertoff failed to activate the IIMG until 36 hours after landfall despite White House pressure to do so earlier.²⁴⁵ When the IIMG was activated, its relationship with the HSOC was unclear at best and the IIMG devolved into an information gathering and dissemination center duplicating other federal efforts and creating another layer of bureaucracy.²⁴⁶ The IIMG was not included in the NRF and its role not formally replaced. The Senate report on Hurricane Katrina did provide, however, the following advice for a future IIMG:

The IIMG would be disbanded and replaced by a permanent policy staff composed of detailees from relevant federal agencies who would conduct planning for emergencies and would help resolve conflicts among different federal entities. Conflicts that could not be resolved at this level would be forwarded to higher-level agency officials or the HSC [Homeland Security Council] for resolution. The NOC [National Operations Center] would include a strong analytic team capable of sorting through and assessing information and determining which pieces would become part of the common operating picture.²⁴⁷

²⁴³ *National Response Plan (NRP)*, 22.

²⁴⁴ *Ibid.*

²⁴⁵ U.S. House of Representatives, *A Failure of Initiative, Final Report of the Select Bipartisan Committee*, 134.

²⁴⁶ Department of Homeland Security, Office of Inspector General, “A Performance Review of FEMA’s Disaster Management Activities in Response to Hurricane Katrina, DHS OIG Report OIG-06-32, March 2006, 26.

²⁴⁷ U.S. Senate, *Hurricane Katrina: A Nation Still Unprepared, Special Report of the Committee on Homeland Security and Governmental Affairs*, 612.

With the demise of the IIMG, no formal operational level interagency body exists to identify or adjudicate interagency disputes when coordinating the federal operational response to a disaster. The NRCC is not currently organized to have senior interagency representation with the authority to mobilize agency resources necessary to respond to an existential catastrophe. The closest entity to an interagency operational level adjudication body is the ESFLG. According to its charter, finalized in October 2010:

The ESFLG is an interagency body for identification and resolution of operational issues related to the National Response Framework (NRF), the National Disaster Recovery Framework (NDRF), appropriate Homeland Security Presidential Directives (HSPD), and other related directives. The ESFLG facilitates information exchange and coordinates policy implementation on national-level issues. The ESFLG determines which of its issues are appropriate for elevation to the Interagency Policy Committees (IPC), including the Domestic Resilience Group (DRG), for further consideration and resolution. The ESFLG, through its membership, is responsible for the coordination of interagency guidance and policy implementation, and the oversight of appropriate planning efforts.²⁴⁸

ESFLG membership includes the primary agencies for each of the 15 ESFs under the NRF.

- Department of Agriculture
- Department of Agriculture/Forest Service
- Department of Defense (OSD, Joint Staff)
- Department of Defense/U.S. Army Corps of Engineers
- Department of Energy
- Department of Health and Human Services
- Department of Homeland Security
- Department of Homeland Security/federal Emergency Management Agency
- Department of Homeland Security/National Protection and Programs Directorate/Cybersecurity & Communications/National Communications System
- Department of Homeland Security/U.S. Coast Guard

²⁴⁸ Conflicting information was received whether the ESFLG member agencies have actually signed the current charter. The copy provided to the author is unsigned.

- Department of Housing and Urban Development
- Department of the Interior
- Department of the Interior/National Park Service
- Department of Justice
- Department of Transportation
- Environmental Protection Agency
- General Services Administration
- Small Business Administration

Members are expected to be able to speak authoritatively on behalf of their agencies. The ESFLG is chaired by the FEMA Assistant Administrator for Response and meets monthly. It did not formally meet, however, during Hurricane Sandy. Based upon the author's first hand experience, the ESFLG appears to be limited to policy making, not operational decision making, and it does not appear the ESFLG has a formal role during an actual disaster response. Unlike its predecessors, it does have a clear chain of authority to report its issues and disputes to the DRG, which is an IPC of the HSC.²⁴⁹ As an IPC, the DRG is a standing committee of senior federal agency and department members.²⁵⁰ It may forward policy issues for adjudication to the NSC Deputies Committee, which may send issues for resolution to the NSC Principals Committee, which meets at the cabinet secretary level.

²⁴⁹ President Obama merged the staffs of the HSC and the National Security Council with PPD-1 issued on February 13, 2009. However, a separate HSC and NSC are provided for in statute even though the Obama Administration appears to have abandoned the use of the HSC and instead uses an expanded NSC as the forum to discuss homeland security related issues.

²⁵⁰ *National Exercise Program (NEP) Base Plan*, March 18, 2011, 3.

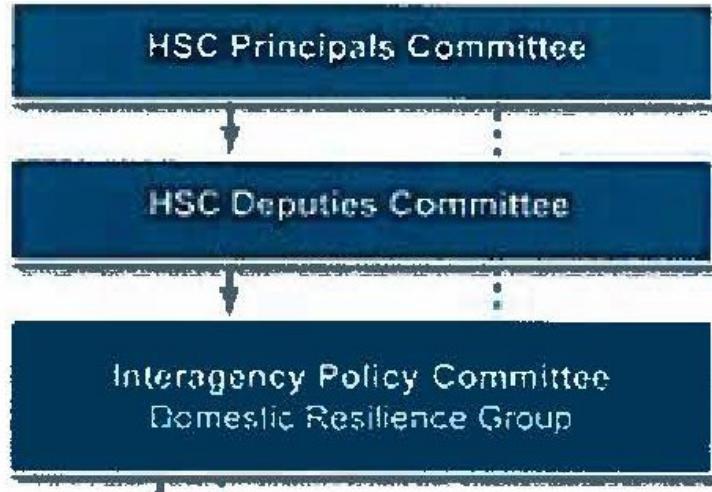


Figure 1. Homeland Security Council Policy Adjudication Diagram²⁵¹

Under the NSS, these issues are staffed in the Resilience Directorate, which has two components, Preparedness and Response.²⁵²

O. THE FEDERAL COORDINATING OFFICER AND THE PRINCIPAL FEDERAL OFFICIAL

Under current law, three civilian positions have some inherent authority to provide for the ability to coordinate, and to a certain extent direct, the federal response to a catastrophic disaster. These positions are the PFO, the FEMA Administrator, and the FCO.²⁵³ The positions are not necessarily mutually exclusive as the position of FCO can be delegated to any federal official including a PFO or the FEMA Administrator.²⁵⁴

1. FCO

The FCO position was first established in the Disaster Relief Act of 1969:

The President shall, immediately upon his designation of an area as a major disaster area, appoint a federal coordinating officer to operate under

²⁵¹ *National Exercise Program (NEP) Base Plan*, 5.

²⁵² David Marcozzi, “National Security Staff within the Executive Office of the President,” *Yale New Haven Health System*, May 2012, <http://www.ynhhs.org>.

²⁵³ This paper does not seek to address whether inherent Article II executive powers held by the President could also provide this authority.

²⁵⁴ See 42 U.S.C. § 5143.

the Office of Emergency Preparedness in such area. Such officer shall be responsible for the coordination of all federal disaster relief and assistance, shall establish such field offices as may be necessary for the rapid and efficient administration of federal disaster relief programs, and shall otherwise assist local citizens and public officials in promptly obtaining assistance to which they are entitled.²⁵⁵

At the time, the FCO operated under the OEP, which was part of the White House. The chain of command for the first FCO ran from the head of OEP, retired general George Lincoln, to the president. Sometimes, as in the case of Frank Carlucci who fronted the federal government's response to Tropical Storm Agnes, it went directly to the president.²⁵⁶ Interestingly in Carlucci's case, he was not actually appointed FCO; the OEP Regional Director retained that position, but Carlucci was considered by all to be the senior federal official and effectively wielded the power of a FCO. Carlucci was not appointed "Flood Czar" until 50 days after the floods, but his appearance dramatically shifted the perception of the federal government. In the words of the Pennsylvania Governor, Milton Shapp "But in Milton, Reading, York, Pottstown—you can go right around the State in community after community. In Harrisburg Itself, we had a major disaster. But here it was so intense, so immense, that the complete failure of the system became evident. Then the president solved it. He put Frank Carlucci here and said, "He is representing me." Frank Carlucci came up here and he took over and he banged heads together. He had the authority to do it. We worked with him and some order came out of chaos. It was not perfect, but it was a darn sight better than anything that happened before. This is the type of thing that I think is essential when you have a major calamity."²⁵⁷

When OEP was disbanded and its disaster relief functions were mostly taken up by the newly created FDAA within HUD in 1973, the FCO chain of command was

²⁵⁵ *Disaster Relief Act of 1969* Public Law 91-79, Sec. 9.

²⁵⁶ William C. Kashatus, "Agnes 'Flood Czar' Steered Federal Aid to Region," *Standard Speaker*, February 14, 2010, <http://www.standardspeaker.com/news/agnes-flood-czar-steered-federal-aid-to-region-1.612385>.

²⁵⁷ *To Investigate the Adequacy and Effectiveness of Federal Disaster Relief Legislation*, Part 3, May 11-12, 1973, Serial No. 95-H6, 891.

dramatically lengthened.²⁵⁸ The duties of the current position of FCO can be found in the NRF, which states, “Within the Unified Coordination Group, the FCO is the primary federal official responsible for coordinating, integrating, and synchronizing federal response activities.”²⁵⁹

Today, the position of FCO is filled by a member of FEMA’s Office of Federal Disaster Coordination, which has a roster of approximately 35 FCOs. FEMA has also created the position of Federal Disaster Recovery Coordinator (FDRC), which effectively has the same power as an FCO but for recovery. No statutory or regulatory requirement states that a FCO must come from FEMA.²⁶⁰

The authority for the position of FCO comes from two sources, the president and the FEMA Administrator.²⁶¹ The FCO simultaneously wields these powers that on their face provide FCO’s authority directly from the president to

coordinate the administration of relief, including activities of the State and local governments, the American Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief or disaster assistance organizations, which agree to operate under his advice or direction... take such other action, consistent with authority delegated to him by the President and consistent with the provisions of this Act, as he may deem necessary to assist local citizens and public officials in promptly obtaining assistance to which they are entitled.²⁶²

The last section is important as it provides the statutory basis for the FCO to utilize the powers found under Sections 402,²⁶³ 403,²⁶⁴ and 502²⁶⁵ of the Stafford Act, which

²⁵⁸ See EO 11725 *Transfer of Certain Functions of the Office of Emergency Preparedness*.

²⁵⁹ *National Response Framework*, 64.

²⁶⁰ See 42 U.S.C. §5143 and 44 CFR 206.41.

²⁶¹ The FCO also gets authority from FEMA Regional Administrators via their appointment as Disaster Recovery Manager (DRM). However, this term is an anachronism from prior years and superfluous to the authority granted from the FEMA Administrator and President and should probably be eliminated. See 44 CFR 206.41(b).

²⁶² 42 U.S.C. § 5143(b)(3)–(4).

²⁶³ 42 U.S.C. § 5170a.

²⁶⁴ 42 U.S.C. §5170b.

²⁶⁵ 42 U.S.C. § 5192.

collectively allow the president, and FCO, to direct federal agencies, reimburse them for their work, and otherwise coordinate their actions.

Through their appointment from the FEMA Administrator, the FCO receives powers outside Titles IV and V of the Stafford Act. The PKEMRA gave specific, enumerated powers to the FEMA Administrator including:

... federal leadership necessary to prepare for, protect against, respond to, recover from, or mitigate against a natural disaster, act of terrorism, or other man-made disaster, including... providing the federal Government's response to terrorist attacks and major disasters, including...managing such response...and coordinating other federal response resources, including requiring deployment of the Strategic National Stockpile, in the event of a terrorist attack or major disaster...aiding the recovery from terrorist attacks and major disasters...carrying out the mission of the Agency... of... response, by conducting emergency operations to save lives and property through positioning emergency equipment, personnel, and supplies, through evacuating potential victims, through providing food, water, shelter, and medical care to those in need, and through restoring critical public services...²⁶⁶

The FCO may also receive additional powers found in Title VI of the Stafford Act through their delegation from the FEMA Administrator. Title VI is the restatement of Federal Civil Defense Act of 1950, which gave exceptionally broad authorities to the Federal Civil Defense Administrator upon declaration of a state of civil defense emergency proclaimed by the president or Congress.²⁶⁷ While the most extraordinary powers of the act were eliminated when the Federal Civil Defense Act of 1950 was revoked and restated in the Stafford Act, some exceptional authorities remain including the right to procure private property by condemnation.²⁶⁸

²⁶⁶ 6 U.S.C. § 314. See Appendix G for the full text.

²⁶⁷ *Federal Civil Defense Act of 1950*, Public Law 81920.

²⁶⁸ See 42 U.S.C. § 5196(i)(1): The director (administrator) may procure by condemnation or otherwise, construct, lease, transport, store, maintain, renovate, or distribute materials and facilities for emergency preparedness, with the right to take immediate possession thereof.

2. PFO²⁶⁹

The PFO actually consists of two versions. The first is found in HSPD-5 Management of Domestic Incidents. In this directive from 2003, the president has designated the Secretary of DHS as the “principal federal official for domestic incident management... responsible for coordinating federal operations within the United States to prepare for, respond to, and recover from terrorist attacks, major disasters, or other emergencies...” The directive notes four conditions when this authority is triggered: (1) a federal department or agency acting under its own authority has requested the assistance of the Secretary, (2) the resources of state and local authorities are overwhelmed and federal assistance has been requested by the appropriate state and local authorities, (3) more than one federal department or agency has become substantially involved in responding to the incident, or (4) the Secretary has been directed to assume responsibility for managing the domestic incident by the president. It directs “all federal departments and agencies shall cooperate with the Secretary in the Secretary’s domestic incident management role.”

Even with the subsequent passage of the PKEMRA in 2006, the authority and position of PFO under HSPD-5 remains in effect. With the exception of those federal agencies that might have their own independence preserved by law, such as the DoD, uninterrupted statutory chain of command with its combatant commanders,²⁷⁰ given one of those four conditions, the Secretary can execute the duties of PFO under HSPD-5. However, as a member of the president’s cabinet with exceptional responsibilities beyond disaster response including border security, immigration, and law enforcement, the Secretary may not be expected to devote their full energies to directing the federal response to a catastrophic disaster. For this reason, a second PFO position exists, which can be found under the NRF, and its predecessor, the NRP.

²⁶⁹ As previously noted, the current version of the NRF released in May 2013 does not include the PFO except in reference to the DHS Secretary’s authority under HSPD-5.

²⁷⁰ See 10 U.S.C. §§ 162 and 164.

The second PFO position, essentially a direct delegate of the DHS Secretary, can be found under the NRF,²⁷¹ and its predecessor, the NRP. It is also the PFO position that is referred to in PKEMRA.²⁷² Under the NRP, which was in effect during Hurricane Katrina, the position of PFO was defined as follows:

The PFO is personally designated by the Secretary of Homeland Security to facilitate federal support to the established ICS Unified Command structure and to coordinate overall federal incident management and assistance activities across the spectrum of prevention, preparedness, response, and recovery. The PFO ensures that incident management efforts are maximized through effective and efficient coordination. The PFO provides a primary point of contact and situational awareness locally for the Secretary of Homeland Security. The Secretary is not restricted to DHS officials when selecting a PFO.

The PFO does not direct or replace the incident command structure established at the incident, nor does the PFO have directive authority over the SFLEO, FCO, or other federal and State officials. Other federal incident management officials retain their authorities as defined in existing statutes and directives. The PFO coordinates the activities of the SFLEO, FCO, and other federal officials involved in incident management activities acting under their own authorities. The PFO also provides a channel for media and public communications and an interface with appropriate jurisdictional officials pertaining to the incident. Once formally designated, PFOs relinquish the conduct of all normal duties and functions. PFOs may not be “dualhatted” with any other roles or responsibilities that could detract from their overall incident management responsibilities.²⁷³

Several changes were made to the position of the PFO when the NRP was changed to the NRF after Hurricane Katrina. The position of PFO under the current NRF now reads:

Principal federal Official (PFO). By law and by Presidential directive, the Secretary of Homeland Security is the principal federal official responsible for coordination of all domestic incidents requiring multiagency federal response. The Secretary may elect to designate a single individual to serve as his or her primary representative to ensure consistency of federal support as well as the overall effectiveness of the

²⁷¹ As stated previously, all references to the NRF, unless stated otherwise, are to the 2008 version.

²⁷² See 6 U.S.C. (c)(2).

²⁷³ *National Response Plan (NRP)*, 33.

federal incident management. When appointed, such an individual serves in the field as the PFO for the incident.

...

The same individual will *not* serve as the Principal federal Official and the federal Coordinating Officer (*see below*) at the same time for the same incident. When both positions are assigned, the FCO will have

responsibility for administering Stafford Act authorities, as described below. The Secretary is not restricted to DHS officials when selecting a PFO.

The PFO does not direct or replace the incident command structure established at the incident. Nor does the PFO have directive authority over a federal Coordinating Officer, a Senior federal Law Enforcement Official, a DOD Joint Task Force Commander, or any other federal or State official. Other federal incident management officials retain their authorities as defined in existing statutes and directives. Rather, the PFO promotes collaboration and, as possible, resolves any federal interagency conflict that may arise. The PFO identifies and presents to the Secretary of Homeland Security any policy issues that require resolution.²⁷⁴

It was clear it would be difficult to reconcile the duty of the PFO to “coordinate the activities of the SFLEO, FCO, and other federal officials involved in incident management activities acting under their own authorities” with the admonition that the PFO not “have directive authority over the SFLEO, FCO, or other federal and state officials.” The reaction of Congress to the use of a PFO during Hurricane Katrina was extraordinary and direct.

In PKEMRA, Congress made it clear the PFO’s ability to coordinate activities did not mean they could direct other federal agencies. Congress took the step of placing into statute the very same language from the now defunct NRP limiting directive authority.²⁷⁵ This step was not enough for Congress, so beginning with the DHS Appropriation Act for FY 2008, DHS has essentially been barred by law from spending money on the PFO position, as it exists under the NRF.

For instance Section 522 of Public Law 111–83 states:

²⁷⁴ *National Response Framework*, 67.

²⁷⁵ 6 U.S.C. § 319(c).

SEC. 522. Except as provided in paragraphs (1) and (2) of this section, none of the funds provided by this or previous appropriations Acts shall be used to fund any position designated as a Principal Federal Official, or any successor position, for any Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) declared disasters or emergencies—

(1) The Secretary of Homeland Security may waive the application of this section provided that any field position appointed pursuant to this waiver shall not hold the title of Principal Federal Official, shall functionally report through the Federal Coordinating Officer appointed under section 302 of the *Robert T. Stafford Disaster Relief and Emergency Assistance Act* (42 U.S.C. 5143), and shall be subject to the provisions of subsection (c) of section 319 of title 6, United States Code. The Secretary may not delegate the authority to grant such a waiver.

(2) Not later than 10 business days after the date on which the Secretary of Homeland Security issues a waiver under this section, the Secretary shall submit notification of that waiver to the Committees on Appropriations of the Senate and the House of Representatives, the Transportation and Infrastructure Committee of the House of Representatives, and the Homeland Security and Governmental Affairs Committee of the Senate explaining the circumstances necessitating the waiver, describing the specific role of any officials appointed pursuant to the waiver, and outlining measures taken to ensure compliance with subsection (c) of section 319 and subsections (c)(3) and (c)(4)(A) of section 313 of title 6, United States Code.

The position of PFO once held by Coast Guard Admiral Thad Allen in Hurricane Katrina is now, for all intents and purposes, defunct. What remains is the position of PFO as personally embodied by the DHS Secretary under HSPD-5.

P. SUMMARY

The purpose of this chapter was to provide evidence the president has the authority to implement unity of command through a single federal official. This ability is limited, however, and does not include federal agencies that are engaged in law enforcement efforts or the DoD, which has its own distinct chain of command. This authority would also allow the president to utilize the DRF to reimburse federal agencies for disaster work, which could be performed under their existing authority. It would be a key tool for the federal official exercising unity of command on behalf the president, and

crucial to ensuring the cooperation of federal agencies. It would also allow Congress a simpler, and possibly more efficient way, to fund federal response costs for an existential catastrophe. FEMA's regulations, some of which were adopted from regulations written decades ago, currently prohibit reimbursement for work performed under an agency's inherent authorities. However, it appears FEMA's regulations are based on a matter of policy, not law, and could be changed to support unity of command by uniting the authority to direct all federal response actions to an existential catastrophe with the ability to pay for them.

The current system for federal interagency disaster coordination was developed over several decades and incorporates several silos of development. These silos include national federal plans, the adoption of NIMS and ICS, the consolidation of crisis and consequence management, EO 12148 and 12656, PPD-8, the positions of the PFO and FCO, and the current system of White House supervision relying on policymaking structures, which are organized to make deliberate, steady state policy decisions, rather than to make operational decisions. Since all these parts grew at different times from different perspectives, they have never been fully integrated, especially when combined with the concept of unity of effort at the federal operational level of disaster response. Together, they are unable to meet the needs of the president to supervise the federal operational response to an existential catastrophe properly. However, if the president chose to integrate these different parts and implement them at the federal operational level using unity of command through a single federal official, it is argued that it would significantly improve the federal response to an existential catastrophe. The next chapter of this thesis explores what federal official is best suited to prepare for and manage the federal operational response to an existential catastrophe exercising unity of command.

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IV. WHAT FEDERAL POSITION IS BEST SUITED TO PROVIDE UNITY OF COMMAND FOR THE FEDERAL OPERATIONAL RESPONSE TO A CATASTROPHIC DISASTER

The potential exists for unity of command for the federal operational response to an existential catastrophe. The authority to mobilize, coordinate, direct and reimburse the federal civilian agencies engaged in what was formerly known as consequence management would support it. If unity of command for federal consequence management was implemented, it raises the question where might this authority best reside in the federal government? Performing a policy analysis, seven federal officials or positions have been chosen as potential alternatives to exercise unity of command over federal consequence management for an existential catastrophe. Each official or position is evaluated against a set of criteria that arises from reoccurring themes that appear in the history of the foundations of the federal response to disasters. Alternatives are ranked against each other using the criteria chosen from one to seven, with the lower score being the more favorable alternative. The alternative with the lowest overall score would indicate it would be the most appropriate option to exercise unity of command for the federal operational response. These criteria should represent the minimum number of factors necessary to implement unity of command at the operational level for federal consequence management to an existential catastrophe. Once an alternative is chosen, the federal response to Hurricane Katrina will be revisited by utilizing the model of unity of command exercised by the chosen alternative, and will envision an alternative response to the disaster.

A. ALTERNATIVES

Seven alternatives have been chosen to exercise unity of command. They consist of agency heads, or appointed positions, that have exercised some level of authority over the federal response in past disasters. The alternatives are as follows.

- Status Quo—Continue to rely on unified command, a unified command group and ad hoc interagency operational adjudication structure.²⁷⁶
- The Secretary of Homeland Security
- The Commanding General, United States Northern Command (USNORTHCOM)
- The FEMA Administrator
- The Principal Federal Official (PFO)
- The Federal Coordinating Officer (FCO)
- A lead federal agency based upon the type of event—A return to PDD-39.

The status quo reflects the current system for the federal operational response based upon unity of effort. At the field level, a FCO appointed from FEMA uses the UCG at the JFO to coordinate the federal response but does not direct federal agencies. The FCO can issue a MA to federal agencies with the promise for reimbursement but cannot order them actually to perform the work. Disputes over whether work to be performed by the federal government falls under that agency’s existing authority or whether an agency will accept a MA must be elevated to officials outside the JFO. This may be routed through FEMA’s Regional Response Coordination Centers (RRCC) and NRCC but the actual adjudication is done through ad hoc methods, distinct from the interagency policy adjudication process under PPD-1. Senior officials will either contact each other directly as one or more agencies elevate issues, or they will be addressed through ad hoc working groups.

Resourcing requirements from state and local governments can be routed up through the JFO structure for interagency visibility but no single source for initiating top-down “push” resourcing across the federal government exists. No official federal entity is currently organized at the federal operational level to holistically collect, prioritize, and provide resources to multiple federal agencies, as well as situational awareness of all remaining federal resources released to disaster response except what is spontaneously created during a disaster. However, the FEMA NRCC, supporting RRCC’s and JFO’s do

²⁷⁶ Related, but distinct from the federal interagency policy process executed under PPD-1.

maintain a level of situational awareness of assets committed through the response from tracking the response to state requests for assistance and as reported out through ESF's.

The DHS Secretary is the principal federal official for incident management under HSPD-5 and is the head of the DHS with direction, authority, and control over it.²⁷⁷ The Secretary is vested with all functions of all officers, employees, and organizational units of the department.²⁷⁸ The mission of the DHS is set forth in statute and includes preventing terrorist attacks within the United States, reducing the vulnerability of the United States to terrorism, minimizing the damage, and assist in the recovery from terrorist attacks that do occur within the United States, execute all functions of entities transferred to the department, and by acting as a focal point regarding natural and manmade crises and emergency planning. The Secretary has been delegated the authority to execute the key provisions of the Stafford Act but has further delegated that responsibility to the FEMA Administrator.

The commanding general, USNORTHCOM, is the DoD combatant commander for the United States, excepting Hawaii, which falls under United States Pacific Command (PACOM), and also serves as the commander for the North American Aerospace Defense Command (NORAD).²⁷⁹ As one of the six geographic combatant commanders for the DoD, this position reports directly to the Secretary of Defense.²⁸⁰ As stated on its website:

²⁷⁷ 6 U.S.C. § 112.

²⁷⁸ However, in the case of FEMA, for instance, see 6 U.S.C. § 316, which prevents the Secretary from substantially or significantly reducing the authorities, responsibilities, or functions of FEMA or the capability of FEMA to perform those missions, authorities, responsibilities, except as otherwise specifically provided for in an Act enacted after the PKEMRA. This situation presumably protects not just the authority given to FEMA and the Administrator in the PKEMRA but also the authority given directly to the Administrator in Title VI of the Stafford Act, formerly the Federal Civil Defense Act of 1950.

²⁷⁹ See U.S. Northern Command, "About USNORTHCOM" (n.d.), <http://www.northcom.mil/AboutUSNORTHCOM.aspx>, and United States Pacific Command, USPACOM Facts, Headquarters, United States Pacific Command" (n.d.), <http://www.pacom.mil/about-uspacom/facts.shtml>. Under the definition of an existential catastrophe, events affecting Hawaii would not reach that scale of an event; however, PACOM could be substituted for USNORTHCOM as discussed herein for a catastrophic event in Hawaii.

²⁸⁰ Ibid.

USNORTHCOM consolidates under a single unified command existing missions that were previously executed by other DoD organizations. This provides unity of command, which is critical to mission accomplishment. USNORTHCOM plans, organizes and executes homeland defense and civil support missions, but has few permanently assigned forces. The command is assigned forces whenever necessary to execute missions, as ordered by the President or Secretary of Defense... USNORTHCOM's civil support mission includes domestic disaster relief operations that occur during fires, hurricanes, floods and earthquakes. Support also includes counter-drug operations and managing the consequences of a terrorist event employing a weapon of mass destruction. The command provides assistance to a Primary Agency when tasked by DOD. Per the Posse Comitatus Act, military forces can provide civil support, but cannot become directly involved in law enforcement.²⁸¹

The mission of the FEMA Administrator and FEMA were delineated by the PKEMRA in 2006.²⁸² The primary mission of FEMA "is to reduce the loss of life and property and protect the Nation from all hazards, including natural disasters, acts of terrorism, and other man-made disasters, by leading and supporting the Nation in a risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation."²⁸³ The FEMA Administrator's powers include developing, leading, and managing the federal response to disasters and acts of terrorism, building NIMS, and consolidating federal emergency plans into a single plan and administering the NRP. The FEMA Administrator is the principal advisor to the president, the HSC, and the DHS Secretary for all matters relating to emergency management in the United States and may be designated a member of the cabinet in the event of natural disasters, acts of terrorism, or other man-made disasters.²⁸⁴ Congress also requires the Administrator to meet certain qualifications including five years of executive leadership and a demonstrated ability in emergency management and homeland security.²⁸⁵ In addition, the DHS Secretary "may not substantially or significantly reduce the authorities, responsibilities, or functions of the Agency or the capability of the

²⁸¹ U.S. Norther Command, "About USNORTHCOM."

²⁸² See 6 U.S.C. §§ 313–314.

²⁸³ 6 U.S.C. § 313.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

Agency to perform those missions, responsibilities, except otherwise specifically provided in an Act enacted after the date of enactment of the Post-Katrina Emergency Management Reform Act of 2006.”²⁸⁶

The positions of PFO and FCO have been previously described in detail. The position of PFO, for this alternative, is the one akin to the one exercised by Admiral Allen in 2005 and would be a direct delegate of the DHS Secretary, operating under current law and authority. The position of FCO would be a more robust position than is currently exercised, using the full extent of the position’s authority as provided by the Stafford Act through the president, the FEMA Administrator and Regional Administrators. No statutory or regulatory provision limits the appointment of FCOs to a member of FEMA.²⁸⁷ The FCO would be drawn from FEMA’s current FCO cadre or a similarly situated federal officer from another agency. FEMA’s FCOs are currently temporary full-time (TFT) employees at the GS-15 level.

The Lead Federal Agency (LFA) model will be based upon the approach found in PDD-39 and the FRP as it related to other federal emergency plans.

B. Concurrent Implementation of Other federal Emergency Plans

1. An incident involving hazardous substances, weapons of mass destruction, or other lethal agents or materials may require a response under another federal emergency operations plan (National Contingency Plan, federal Radiological Emergency Response Plan, etc.). These plans delineate measures necessary to handle or contain released materials and keep the public properly informed and protected.
2. Several of these plans designate a Lead federal Agency (LFA) to coordinate the federal response. The LFA is determined by the type of emergency. In general, an LFA establishes operational structures and procedures to assemble and work with agencies providing direct support to the LFA in order to obtain an initial assessment of the situation, develop an action plan, and monitor and update operational priorities. The LFA ensures that each agency exercises its concurrent and distinct authorities

²⁸⁶ 6 U.S.C. § 316.

²⁸⁷ The FEMA regulation is 44 CFR 206.41.

and supports the LFA in carrying out relevant policy. Specific responsibilities of an LFA vary according to the agency's unique statutory authorities.

3. If the incident also involves concurrent implementation of the FRP, the LFA and FEMA coordinate to the maximum extent practical to ensure effective, unified federal actions, consistent with their distinct authorities and responsibilities. Direct FEMA support to an LFA is limited to FEMA's own authorities, resources, and expertise as an individual agency.

4. In a response to an emergency involving a radiological hazard, the LFA under the FRERP is responsible for federal oversight of activities on site and federal assistance to conduct radiological monitoring and assessment and develop protective action recommendations. When a radiological emergency warrants action under the Stafford Act, FEMA uses the FRP to coordinate the non-radiological response to consequences off site in support of the affected State and local governments. If the FRERP and FRP are implemented concurrently, the federal On-Scene Commander under the FRERP coordinates the FRERP response with the FCO, who is responsible for coordination of all federal support to State and local governments. (Operational interfaces between the FRP and other federal emergency plans are covered in more detail in the pertinent ESF and incident annexes).²⁸⁸

The LFA is determined by the type of emergency. In general, an LFA establishes operational structures and procedures to assemble and work with agencies providing direct support to the LFA in order to obtain an initial assessment of the situation, develop an action plan, and monitor and update operational priorities. The LFA ensures that each agency exercises its concurrent and distinct authorities and supports the LFA in carrying out relevant policy. Specific responsibilities of an LFA vary according to the agency's unique statutory authorities.²⁸⁹

As envisioned under this alternative, the LFA would have the additional powers to direct other federal agencies supporting its efforts. Multiple LFAs would not exist and any change between LFAs would be a linear, not bifurcated process. For instance, should the United States be attacked using one or more Improvised Nuclear Devices (INDs), the Attorney General, through the FBI, would be the LFA. For an existential catastrophe caused by a man-made event, such as a nuclear power plant failure, or a pandemic or

²⁸⁸ FRP, April 1999, 11–12.

²⁸⁹ Ibid.

agricultural catastrophe, the agencies that have authority to regulate and respond under the own authorities would be the LFA. The shared characteristic of these LFAs is the federal government does not need a Stafford Act declaration to respond to the catastrophe, although a declaration may occur later as gaps in authority are discovered and need to be filled. For example, one gap might be long-term housing in response to a biological hazard that makes a wide area of the country uninhabitable.

B. CRITERIA

The seven alternatives will be ranked using the following criteria.

- Compliance with current law
- Political acceptance by the:
 - President
 - Congress
 - Federal agencies
 - States
- Efficiency in mobilizing, coordinating and directing the federal response through:
 - Identifying federal response capabilities
 - Organizing federal response capabilities
 - Coordinating federal response capabilities
 - Directing federal response capabilities
 - Engaging the Whole Community for response
- Public Acceptance including the Whole Community

For the criteria political acceptance and efficiency, the sub-criteria will be averaged to give an overall score for the criteria. The four primary criteria were chosen because they appear to include all the historically relevant parties for federal disaster response to include the minimum level of acceptance for implementation of unity of command. Since the purpose for creating unity of command is to provide for the mobilization, coordination, and direction of federal entities, a legal basis for it must exist. Prior to 1980, it was mostly accomplished through EOs and presidential reorganization plans submitted to Congress. With the HSA and the PKEMRA, a more

vigorous authority for these activities in statute alongside existing EO_s, regulations and guidance with significant influence, such as the NRF, now do exist.

Political acceptance is defined as whether the primary actors in catastrophic disaster response will accept, as a matter of political expediency, unity of command over the federal civilian response to an existential catastrophe. Thus, in addition to such facially apparent actions as Congress not limiting unity of command in law, as it did with the PFO, it must break through the interagency culture, which may favor the status quo. The five sub-criteria were chosen, as all these actors are necessary for unity of command. Fundamentally, unity of command for the federal civilian response belongs to the president himself either through his constitutional powers or through that given to him from Congress. The premise of unity of command is the power of the president is delegated to a single entity at the appropriate level in the federal government to execute his direction and intent. This power has appeared before, such as the experience of Frank Carlucci in 1972 or Admiral Allen in 2005, but has not been consistently exercised, and in both cases, it occurred after the primary federal response was over. While acceptance by the president will always remain an individual choice that may differ from president to president, what can be consistently captured is the president does in fact have a choice of delegating his authority to mobilize, direct, and coordinate the federal civilian response to a single person.

The reason the president may choose to exercise unity of command is based on two main arguments. The first is it shortens and clarifies the chain of command. The president can expect his orders and intent are more clearly understood, as it would go through fewer layers of bureaucracy. It would also be similar to the president's current relationship to his senior combatant commanders in the DoD who report only through the Secretary of Defense. Second, it could provide a buffer for the president should the federal response be perceived poorly. If the response goes well, the president could receive the credit for appointing and supporting the federal official exercising unity of command. However, if it goes poorly, the president will now be able to factually report a federal official currently possesses the power and resources to respond to a catastrophe, and the poor response is the result of one of two problems; either the catastrophe was so

terrible as to outstrip any reasonable federal response, or the result of poor leadership of that federal official, who despite having the necessary support and resources, failed to take advantage of them. While the president will always receive criticism, he would be shielded from at least some criticism that would come from having a “rump” coordinator of the federal response such as in the case of Hurricane Katrina.

Next to the president, Congress must also accept unity of command. As with the experience of the PFO, Congress has the ability to marginalize and defund this power if it chose. While arguments could be made the president has constitutional powers that could minimize Congress’s intrusion, given the foundation for unity of command is based upon legislation including the Stafford Act and PKEMRA, it is unlikely a president would expend the political capital necessary to overcome a negative reaction by Congress.

While the president and the Congress might both agree to unity of command, actually, for it to function, a functional level of acceptance by a critical mass of federal agencies must exist, enough so to encompass the federal capabilities necessary to respond to an existential catastrophe. While statutory and executive authority, and appropriations, may go a long way, federal agencies may perceive they will be asked to cede power they may have previously exercised independently, or at least perceived they did. Mobilizing federal agencies to spend time preparing for a catastrophe is not their primary function. Time spent mobilizing and preparing for an existential catastrophe results in a lost opportunity cost for resources, in personnel time and funding that could have been spent on their primary mission. This situation results in a level of friction to any change towards a system emphasizing unity of command. This friction may be mitigated once it is explained the primary purpose is not to hoard this power but instead to delegate it operationally and tactically.

Federal disaster law, from the days of ad hoc legislation and through the disaster relief acts, has always been based upon a premise rooted in the Tenth Amendment that response to catastrophes is primarily a responsibility of the states.²⁹⁰ An existential catastrophe may raise alternative legal constructs that might include the constitutional

²⁹⁰ Amendment X: The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

requirement, found in Article IV, that the United States guarantee a republican form of government to the states.²⁹¹ However, much of what would be considered mobilization would clearly occur prior to any catastrophe and regardless would require the cooperation of the states. Given the importance of state capabilities to the response to an existential catastrophe, and the importance of restoring and maintaining the legal authority of state governments, political acceptance of the states is necessary for unity of command.

The first two criteria, compliance with current law and political acceptance, are followed by efficiency, which is the substance of unity of command. Efficiency stands for the promise that unity of command will improve the federal response to an existential catastrophe through measured improvement to the federal government's ability to mobilize, coordinate, and direct the federal response.

Five sub-criteria have been identified to capture the cycle of mobilization, coordination, and direction of the federal response. The first is improving the ability to identify federal capabilities prior to an existential catastrophe that could be used for the response. As discussed previously, it would include creating and updating the Federal Response Inventory Capability and annually issuing the Catastrophic Resource Report.

Identification of federal capabilities is crucial for several reasons. First, it is impossible to have a timely response if the first hours of an existential catastrophe are spent locating and requesting federal resources. Second, without a catalogue of federal capabilities, any gap assessments are incomplete since federal capabilities may be involved, which already exist but are found in non-traditional providers to the federal response. It is also possible that capabilities believed to reside in the federal government do not actually exist. Third, it would allow the evaluation of the most efficient use of federal resources to fulfill capability requirements; it may result that less expensive options are available, in terms of lost opportunity costs or financial and personnel costs, to the current utilization of federal capabilities, to free them up for more important or difficult tasks.

²⁹¹ Article IV Section 4: The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

After identification comes organization. Once federal capabilities have been identified, they must be organized to allow for efficiency. Efficiency in terms of organization means given a specific task, the most appropriate federal capability has been identified to fulfill it. Appropriate means balancing timeliness and cost. Cost includes the lost opportunity cost; can another competing task be better filled by this capability? It also includes direct costs in funding and numbers of federal personnel or assets dedicated to that capability. The process to prepare for the most efficient use of federal capabilities, a function of time and cost, is found in the organization of identified capabilities.

The next two sub-criteria, coordination and direction, can be discussed concurrently. Coordination was previously defined as “the ability of the President to provide order amongst federal agencies responding under their inherent, supplemental, or event triggered authorities, to respond to a catastrophic incident.”²⁹² In contrast, direction was defined as “the President’s ability, using either his Constitutional or Congressionally provided authority, to order federal agencies to take specific actions, or courses of action, based upon his strategic, political and to the extent exercised by the president, operational judgment.” Given the power of unity of command over the federal civilian response to an existential catastrophe, the federal official exercising it will be required to provide both coordination and direction at the operational level under the delegated authority from the president. In this context, coordination can be thought of as ensuring federal agencies are not duplicating efforts, are fully engaged to the extent strategic decision makers have approved, and together are applying the most efficient use of federal capabilities. Direction is the actual ordering of these agencies to engage in the most efficient use of federal capabilities to respond to the existential catastrophe.

Last is engaging the Whole Community. The word “engage” was chosen because the federal official chosen to exercise unity of command over the federal civilian

²⁹² For an alternative view of “coordination,” see the U.S. Library of Congress, Congressional Research Service, *Interagency Collaborative Arrangements and Activities: Types, Rationales, Considerations*, by Frederick M. Kaiser, CRS Report R41803 (Washington, DC: Office of Congressional Information and Publishing, May 31, 2011), which defines coordination as “an arrangement in which a lead agency or officer directs an operation, project, or program among one or more other agencies.” Part of the problem with how coordination is exercised in the federal response to disasters is that what is actually being practiced is collaboration, not coordination.

response is generally limited in their power when working with non-federal partners. While limited coordination authority in the Stafford Act occurs in regards to relief organizations, and in the general authorities of the DHS Secretary and the FEMA Administrator, generally federal officials cannot force the coordination and direction of the diverse members of the Whole Community.

For Stafford Act coordination of relief organizations, see Use and Coordination of Relief Organizations 42 U.S.C. § 5152:

- (a) In providing relief and assistance under this Act, the President may utilize, with their consent, the personnel and facilities of the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief or disaster assistance organizations, in the distribution of medicine, food, supplies, or other items, and in the restoration, rehabilitation, or reconstruction of community services housing and essential facilities, whenever the President finds that such utilization is necessary.
- (b) The President is authorized to enter into agreements with the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief or disaster assistance organizations under which the disaster relief activities of such organizations may be coordinated by the federal coordinating officer whenever such organizations are engaged in providing relief during and after a major disaster or emergency. Any such agreement shall include provisions assuring that use of federal facilities, supplies, and services will be in compliance with regulations prohibiting duplication of benefits and guaranteeing nondiscrimination promulgated by the President under this Act, and such other regulation as the President may require.

For the general authorities of the DHS Secretary, See 6 U.S.C. § 112:

- (c) Coordination with non-federal entities. With respect to homeland security, the Secretary shall coordinate through the Office of State and Local Coordination 1 (established under section 361 of this title) (including the provision of training and equipment) with State and local government personnel, agencies, and authorities, with the private sector, and with other entities, including by—(1) coordinating with State and local government personnel, agencies, and authorities, and with the private sector, to ensure adequate planning, equipment, training, and exercise activities; (2) coordinating and, as appropriate, consolidating, the federal Government's communications and systems of communications relating to homeland security with State and local government personnel, agencies,

and authorities, the private sector, other entities, and the public; and (3) distributing or, as appropriate, coordinating the distribution of, warnings and information to State and local government personnel, agencies, and authorities and to the public.

For the FEMA Administrator, see generally 6 U.S.C. § 313:

Where the Administrator's powers include leading the nation as a whole and includes specific direction to partner with state, local and tribal governments, the private sector and non-governmental organizations.

Limited occasions occur during which Congress has granted the power to federal agencies, such as the Defense Production Act,²⁹³ where a federal official could have some authority that would fall under coordination or direction, but they are specific exceptions to the rule. However, given the breadth of an existential catastrophe, it will require a response of the Whole Community, which will require the engagement of the federal government as the federal government needs to ensure it does not identify, organize and utilize its capabilities in a vacuum. In fact, in many, if not most instances it will occur the most efficient capabilities to accomplish a task lie outside the federal government. The federal official can identify these superior capabilities found throughout the Whole Community through exercising their role as coordinator.

The final criterion is public acceptance. It can be argued that public acceptance is not necessary to implement unity of command over the federal civilian operational response to an existential catastrophe. If the president wants it, Congress does not stop it and federal agencies do not impede it, what else is necessary? First Congress, the state governments and the president, ultimately, react to public opinion, as does the Presidency.²⁹⁴ Second, it is presumptuous to think the federal government can act entirely on its own in its response. As argued above, to respond to an existential catastrophe all persons in the Whole Community need to apply their capabilities as

²⁹³ 50 U.S.C. App. § 2061–2172.

²⁹⁴ Prior to Congress passing any of the major Disaster Relief Acts, Congress held multiple hearings on disaster relief, often in the field, which includes numerous private citizens as witnesses alongside local and state government officials. The DRA of 1950, in particular, included numerous direct pleas from individuals seeking disaster relief. In fact, prior to the DRA of 1950, federal disaster relief often relied on such pleas for assistance. See the discussion of the DRA of 1950 in the Congressional Record at 81 CR 11895–11915, and Senate Report *Disaster Relief, Hearing Before a Subcommittee of the Committee on Public Works United States Senate*, 81st Congress, 2nd sess., S.2415, July 19, 1950.

efficiently as possible. Without the public participating in the identification and coordination of resources in capabilities prior to a disaster, planning will fail. Without coordination during a disaster, duplication of effort and a failure of identifying unmet needs will occur. Without the public sector understanding and being prepared to coordinate amongst themselves and with the federal government, confusion and friction will result. For all these reasons, if unity of command is to achieve its purpose, to improve the efficiency of the federal operational response to an existential catastrophe, public acceptance is necessary.

C. EVALUATION

1. Compliance with Current Law

- Rank order:
- (1) FEMA Administrator
 - (2) DHS Secretary
 - (3) Status Quo
 - (4) Lead Federal Agency
 - (5) USNORTHCOM
 - (6) FCO
 - (7) PFO

A single integrated set of federal laws for catastrophes does not exist. However, three mutually overlapping types of laws do essentially exist. The first series of laws are those inherent to federal agencies and are limited to specific types of events. Examples would be the Public Health Service Act²⁹⁵ as later amended by the Pandemic and All-Hazards Preparedness Act,²⁹⁶ the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),²⁹⁷ the Clean Water Act,²⁹⁸ and the Animal

²⁹⁵ *Public Health Service Act*, 58 Stat. 682 (1944) (codified as amended at 42 U.S.C. §§ 201–300mm–61).

²⁹⁶ *Pandemic and All-Hazards Preparedness Act*, Public Law 109–217 (2006).

²⁹⁷ *Federal Water Pollution Control Act*, 62 Stat. 1155 (1948)(codified as amended at 33 U.S.C. §§ 1251–1387).

²⁹⁸ *Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, Public Law 96–510 (1980)(codified as amended at 42 U.S.C. §§ 9601–9628).

Health Protection Act.²⁹⁹ These laws authorize federal agencies, or the president, to take action to respond to certain types of incidents. For example, under CERCLA

Whenever any hazardous substance is released or there is a substantial threat of such a release into the environment, or there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.³⁰⁰

While parts of these laws may need additional authorities to trigger their activation, such as a declaration of a national emergency,³⁰¹ they provide standing, but limited authority, to respond to existential catastrophes. These inherent authorities are not all-encompassing powers. For instance, CERCLA does not provide the president the authority to house and feed families dislocated from their homes due to a release of a hazardous substance.

The second set of law is encompassed under the Stafford Act. As previously noted, it provides both meta-authority, essentially allowing the president to “tie together” numerous federal authorities that may have bearing on an incident but which need to be coordinated, and specific authority that allows the president to take actions to meet immediate threats to life and property filling in gaps in legal authority to respond to a disaster not already covered under other authorities.

The last set of laws is found in the Homeland Security Act, as amended by the PKEMRA, and gives specific authorities to coordinate, lead, and direct the federal response to various incidents. It operates in conjunction with the powers given to the president and the FEMA Administrator in the Stafford Act. The federal officer or position

²⁹⁹ *Animal Health Protection Act*, Public Law 107–171, subtitle E (2002) (codified as amended at 7 U.S.C. §§ 8301–8322).

³⁰⁰ 42 U.S.C. § 9604(a)(1).

³⁰¹ *National Emergencies Act*, Public Law 94–412 (1976) (codified as amended at 50 U.S.C. §§ 1601–1651).

that best ties together these three legal constructs would be in a stronger position to execute unity of command. It is against these questions, which that the alternative positions are judged.

The position of FEMA Administrator is uniquely positioned to execute authorities under all three series of laws. While the FEMA Administrator has little inherent authority to respond to a disaster beyond that found in Title VI of the Stafford Act, and controls few actual response assets,³⁰² the FEMA Administrator otherwise is exceptionally well positioned to mobilize, coordinate, and direct the federal operational response to an existential catastrophe. It is the only position in the federal government where authority can be found to exercise all three types of authorities without additional action by Congress. In addition, little if any change to existing executive orders would be required.

Prior to PKEMRA, the DHS Secretary may have been in a superior position to exercise these three lines of authority. The PKEMRA limited the Secretary's powers to remove or diminish the substantive authorities belonging to FEMA and the FEMA Administrator. However, the DHS Secretary still is in a position of authority over the FEMA Administrator, and arguably, has vested in their position all the Administrator's powers. PKEMRA created two potentially mutually competing concepts, that the FEMA Administrator reports to the DHS Secretary; yet the Secretary cannot take powers from the Administrator. This conundrum can probably be solved by envisioning that only the Administrator or the Secretary can exercise the powers given to the FEMA Administrator, which would include the powers given to the Administrator under PKEMRA, and likely, the Administrator's authority to execute the delegated powers of the Stafford Act.³⁰³ Senator Trent Lott, however, may have made the best argument for

³⁰² The FEMA Administrator controls few actual response assets that include the 28 Urban Search and Rescue (U.S.&R) Task Forces within the United States, communication assets found within its Mobile Emergency Response Support (MERS) Division and prepositioned commodities stored at FEMA Distribution Centers (DCs). The vast majority of federal response assets rest outside of FEMA; however, no single inventory of federal assets is available since DHS and FEMA have never created the federal response capability inventory.

³⁰³ See 6 U.S.C. § 314(a)(7) directing the Administrator to assist the President in executing the Stafford Act.

FEMA's unique position, as he discussed the PKEMRA on the Senate floor on July 11, 2006.³⁰⁴

The status quo is a confederation of sorts. It is centered around the FEMA Administrator, the DHS Secretary, and the acquiescence of other federal agencies under a system consistent with the NRF and its structure centered on ESFs. It may not reflect the full extent of the authority provided to the FEMA Administrator in PKEMRA, or the authority delegated from the president under the Stafford Act, HSPD-5 and other authorities, but it does not appear to violate any statutory prohibitions. As currently implemented, it does not provide for unity of command across the federal civilian agencies.

On its face, no legal prohibition exists against the president ordering the Commanding General USNORTHCOM to serve as a unified commander of civilian and military forces, excepting federal law enforcement agencies. However, as stated previously, the authority to direct the federal response to a disaster through the Stafford Act does not include exceptions to the general prohibition against the use of military forces to engage in law enforcement activities. From a purely legal perspective, the Commanding General USNORTHCOM would provide a wider net of federal integration than any of the alternatives by consolidating the chain of command for both federal civilian agencies not directly engaged in law enforcement activities and the federal military. USNORTHCOM would also have the small benefit of consolidating the authority under the Stafford Act to utilize federal military forces for up to 10 days at the request of a governor but in the absence of a declaration under the Stafford Act.³⁰⁵

The leaders of federal agencies have the inherent ability to respond to incidents under their own authorities independent of the Stafford Act. However, given the size of the response to an existential catastrophe, no single federal agency has sufficient legal

³⁰⁴ See Appendix H for the complete text of his statement. Senator Lott's comments were part of the discussion over Senate Amendment 4560 to Amend the Homeland Security Act of 2002 to Establish the United States Emergency Management Authority. While FEMA was not subsequently renamed, the amendment did in fact pass the Senate 87–11, and the concepts incorporated in the final version of PKEMRA. See Thomas.loc.gov, *Bill Summary & Status* 109th Congress (2005–2006) S. Amdt. 4560 for a complete version of the amendment.

³⁰⁵ 42 U.S.C. § 5170b(c).

authority to mobilize, coordinate, and direct the federal operational response. While they could be provided the powers of the FCO and PFO, just like the Commanding General USNORTHCOM, they would not have the wider authorities given to the FEMA Administrator and DHS Secretary, nor the ability to direct federal military forces.

The position of FCO draws its legal authority from the president through the Stafford Act. However, it does not have the breadth of authority available to either the DHS Secretary, FEMA Administrator, or federal agency heads implementing their inherent authorities. A FCO, who is not also the FEMA Administrator or the DHS Secretary, may be limited in authority to provide the level of coordination in those two positions, and otherwise, may not be able to harness the full authorities of all other federal civilian agencies.

The position of PFO is even less grounded in authority than the other positions. Its only authority in statute states what the position cannot do. By itself, the appointment of PFO cannot deliver the authority to provide unity of command amongst the federal civilian agencies.

2. Political Acceptance

- Rank Order:
- (1) Status Quo
 - (2) FEMA Administrator
 - (3) DHS Secretary
 - (4) USNORTHCOM
 - (5) Lead Federal Agency
 - (6) FCO
 - (7) PFO

Adopting unity of command necessarily means upsetting the status quo of relying on federal unity of effort to prepare for and respond to an existential catastrophe; in other words, altering established roles and norms going back, in some cases, two decades or more. A critical component to achieving unity of command is whether within the federal system its various parts will accept it, which includes the president, whose power is being delegated and exercised by subordinates, Congress, which must continue to authorize it

and appropriate funds to execute it, and the federal agencies, which provide the resources to execute the federal response. In addition, the political acceptance of the states that have their own powers to exercise during disaster response is essential.

As these parties jockey amongst one another for influence, the political process determines their relationships and the distribution of power, influence, responsibility, blame, and resources among them. Unity of command of the federal civilian response must navigate these politics to be adopted and to be successfully implemented. For the president, Congress, federal agencies, and state governments, each will weigh its own interests in adopting unity of command.

Remaining with the status quo, unity of effort amongst federal agencies will create the least amount of political discomfort. While the deficiencies of unity of effort have been discussed previously, the fact remains that despite these problems, even when coupled with the poor federal response to large disasters, none of these actors has been moved to change the status quo. In other words, likely, it may take an even more catastrophic event, coupled with an inadequate federal response, before change occurs, or one of the parties must invest the political capital for change, which is not impossible. However, it cannot be discounted as a sign the federal interagency has reached a consensus over time that the current system is sufficient to meet future threats.

In the 1970s, the pressure of state governors led to President Carter reversing the course set by the Nixon administration a few years before. President Carter would respond by returning most federal response coordination functions to a single federal agency without the pressure of any single, large-scale disaster. Flooding in the upper Midwest, a disaster but not a national crisis, formed the final impetus for the creation of modern federal disaster legislation by Congress in 1950. Neither was the Stafford Act of 1988 a response to any recent single national catastrophe. However, the creation of FEMA, the DRA of 1950, and the Stafford Act appear to be exceptions to the general rule; it takes a poor federal response to a disaster for significant legislative change. This pattern was found in the DRA's of 1966, 1969, 1970, and 1974, the restatement of the Federal Civil Defense Act of 1950 in the Stafford Act, and the PKEMRA in which legislative changes were made in response to recent catastrophes.

More fertile ground for change may be found within the Executive Branch in which constant tinkering through EO's and national plans and frameworks, such as the NRF, allow reoccurring opportunities for change. For these internal Executive Branch processes to lead to change, only the president, or the perceived support of the president, could likely change the inertia to stay with the several decade long tradition of unity of effort. First, the purpose of exercising unity of command is to improve the president's ability to lead the nation's response to an existential catastrophe, thus, the president must find value in it. Second, this thesis has provided evidence that the primary legal support for exercising unity of command is found in the Stafford Act, and that power is vested directly in the president from Congress. However, several arguments might propel the president to make a proactive change without waiting for the next catastrophe.

The most powerful argument for the president might be a simple one of political expedience. While the president will always accept an inordinate amount of praise or blame, currently no one deflects the latter from the president. For example, the relief of Mike Brown as the head of FEMA did little to change the perception that President Bush bore much of the responsibility for the poor federal response to Hurricane Katrina. Despite later attempts by the Administration to portray Brown as having been given full command of the federal response with all the necessary tools, the president was never able to change the narrative.³⁰⁶ However, what if the president actually gave the tools to a subordinate to mobilize, coordinate and direct the federal response fully? While the president always remains ultimately responsible for the federal response, he could now plausibly state that he had provided all the necessary tools, resources, and authorities to a single qualified individual to execute the intent of the president with the advice of his cabinet and staff that could set up a "win-win" situation for the president. If the federal response is seen as successful, the president can reap the reward for having the foresight to appoint the federal official given unity of command. If the response goes poorly, the president can now say he had given all the necessary support to that person whose failure to capitalize this support adequately is responsible for the poor response. The president

³⁰⁶ The attempt to shift blame to Brown probably reached its zenith in the letter prepared by DHS counsel, Phil Perry, for J. Keith Ausbrook, Chief Counsel to the House Select Bipartisan Committee on Katrina dated February 8, 2006. See Appendix 7 to the House Report on Hurricane Katrina.

can then relieve that person for cause, but unlike in 2005, the president will be able to articulate the specific support and responsibilities delegated to that person that should have resulted in a more efficient federal response.

While examples or arguments exist for why the president, Congress, or the states might seek to change the status quo prior to the next catastrophe, it is unlikely federal agencies on their own would seek change. Foremost is the fact that any change coming from the federal interagency community without legislative adjustments would likely require the support of president, the only figure with the power to compel the whole interagency into action. Therefore, while federal agencies may not seek to change the current status quo spontaneously, they do have the ability to impede and frustrate change brought by the president or Congress. The point of unity of command, as stated previously, is to “pay forward” and delegate this responsibility. If federal agencies are not willing to accept this responsibility, or more likely, seek to impede decisions prioritizing and sending resources to other agencies at the expense of their own, they can potentially extinguish any of the benefits gained from unity of command.

Amongst the other options, the question is what level of political friction is likely to be encountered if they were vested with the authority for unity of command. The FEMA Administrator and the DHS Secretary already realize a significant amount of interagency responsibilities for planning for and responding to disasters. While providing them unity of command over federal civilian agencies may be a dramatic expansion of their current roles, it would not be inconsistent with their current responsibilities. The president and Congress are already familiar with the position of DHS Secretary and the FEMA Administrator exercising lesser, but related authority.

The Commanding General USNORTHCOM would also have significant advantages when it came to personal relationships with the president and Congress. The DoD Combatant commanders enjoy an exceptionally short chain of command to the president, so much so that the president often confers directly with them on matters of

policy and strategy.³⁰⁷ The DoD still engenders an image of operational and tactical efficiency from Capitol Hill to state governments that would weigh in the favor of USNORTHCOM. However, state governments and Congress would likely have real concerns should the Commanding General USNORTHCOM be placed in charge of the federal civilian operational response.

The idea of placing military forces in charge of civilian agencies domestically would turn a long-standing American tradition of civilian leadership of military forces on its head.³⁰⁸ The idea that military forces would lead the federal response to disaster was a subject of debate after Hurricane Andrew in that the recent success of the Gulf War stood in contrast to the anemic federal response to Hurricane Andrew. However, those arguments were rejected for several reasons, many of which can be found in the NAPA Report *Coping with Catastrophe*, which went as far as citing a *Parameters* article on what a military coup could look like in the year 2012.³⁰⁹

The LFA model might hold more appeal to the federal interagency community. This more inclusive option would allow federal agencies to maintain and acknowledge their traditional expertise while providing them primary authority for the response to catastrophes in their area of expertise. However, unlike the previous positions, it is unlikely that agencies with sub-cabinet leaders would enjoy the same level of relationships with the president and Congress or have as established ties with state governments and their emergency management enterprise beyond their technical counterparts. It is also unknown if agencies would want to take on the additional

³⁰⁷ For example, think of the close relationship Presidents Bush and Obama had with the U.S. Central Command (CENTCOM) commanders over the last decade and even with the senior commanders for Iraq and Afghanistan who reported to CENTCOM. For example, General David Petraeus served as both as the Commanding General for CENTCOM and later led multi-national forces in Afghanistan. General Stanley McChrystal led the multi-national forces in Afghanistan. Both had continuing direct contact with the President in those positions.

³⁰⁸ The idea of civilian control over military forces dates to the foundation of the country. Several Federalist Papers devote their energy to detailing restraints over a standing army. See, for instance, Federalist #8 and # 26.

³⁰⁹ Charles J. Dunlop, “The Origins of the American Military Coup of 2012,” in *Parameters; U.S. Army War College Quarterly* XXII, no. 4 (Winter 1992–93): 2–20. Then LtCol Dunlop would later rise to the position of Major General and become the Air Force Staff Judge Advocate. He would also go on to coin the term “lawfare.”

coordination requirements, which if not provided additional resources, would have to come from existing capabilities. Federal agencies may prefer a more centralized approach on which they can focus their core competencies and allow other agencies or federal offices to handle interagency coordination responsibilities.

The FCO position is probably most limited by the fact it would place a relatively lower ranking official in charge of the resources and personnel of numerous federal agencies. FEMA's FCO cadre is currently staffed at the GS-15 level; roughly the level of a military colonel, with their national Incident Management Assistance Teams (IMATs) led by junior members of the Senior Executive Service (SES). This lack of seniority diminishes the contact with the president and Congress that would be necessary for their continued support to realize their responsibility to oversee the federal response. Additional friction could also be encountered from other federal agencies at which other federal officials, who nominally outrank the FCO otherwise, would be required to support them both during an event and before it. FCOs would benefit, however, from their continual contact with state officials during smaller disasters creating a situation in which they may actually command more respect outside the federal government than within it.

The PFO would have the advantage over a FCO within the federal government as the PFO historically is provided from more senior federal officials. However, the PFOs, without changes to their responsibilities, would not have the continual exposure to state officials that FCOs have. More importantly, Congress has taken an exceptionally dim view of the PFO as an operational position as evidenced by its defunding of the position and restricting its control over the FCO.³¹⁰ This hostility would likely doom any expansion of the role of PFO and diminish any enthusiasm within the Executive Branch and the president. While the president might be tempted by the flexibility of a PFO, he could already accomplish that with the FCO position.

³¹⁰ See earlier discussion of the PFO in Chapter II.

3. Efficiency in Mobilizing, Coordinating, and Directing

- Rank Order:
- (1) FEMA Administrator
 - (2) DHS Secretary
 - (3) FCO
 - (4) USNORTHCOM
 - (5) Status Quo
 - (6) PFO
 - (7) Lead Federal Agency

As discussed previously, five criteria have been identified for ranking the efficiency of mobilizing, coordinating, and directing the federal civilian operational response to an existential catastrophe. They are identifying federal response capabilities, organizing federal response capabilities, coordinating federal response capabilities, directing federal response capabilities, and engaging the Whole Community. Identification during the mobilization or preparedness stage would likely include two major themes; the first would be cataloging federal resources for inclusion in the federal Response Inventory Capability and the Catastrophic Resource Report. The second theme would be the credentialing and typing of these resources. Organized along the lines of the core capabilities found in the National Preparedness Goal, these capabilities would each be the subject of a PSMA. The PSMAs would form the basis for the next step, that of the organization of federal response capabilities.

Considering the Comprehensive Preparedness System already dictates the FEMA Administrator to conduct this work, the Administrator should be well suited to execute these tasks. Building upon recent work in developing the National Preparedness Goal and other related documents and frameworks, the Administrator should be able to leverage existing resources and personnel within FEMA to do this work. The two largest drawbacks would be whether FEMA had enough resources on its own to manage such a task, and whether the Administrator could convince other federal agencies to commit the resources to catalog their capabilities and then continue to update them. It is likely presidential involvement, perhaps in the form of an EO, might be needed to get the necessary high-level attention of all federal agencies.

The DHS Secretary, through their Office of Operations Coordination and Planning (OOCP),³¹¹ might also be situated to perform these tasks. However, OOCP has a much more narrow focus than FEMA, and mostly emphasizes intelligence and information sharing and defeating terrorist threats.

Relying on multiple federal agencies, each in their LFA role, might provide the greatest ability to discover non-traditional resources and could draw upon their own expertise in determining the most efficient use of resources. However, if the LFA route was chosen, it could lead to silos of resources without some overarching mechanism to coordinate the various capabilities being identified in each subject area and create redundant efforts. It would be difficult to mesh LFA resource identification efforts without eventually resorting to a single agency with responsibility to draw them all together or to supervise and apply pressure to those LFA efforts that fall short of expectations.

USNORTHCOM has the advantage of drawing upon an enormous planning capability in both personnel and experience that no other federal agency can match. USNORTHCOM is also a professional heir to the efforts of the U.S. Army in Western Europe in 1945, which successfully managed the largest humanitarian effort in U.S. history. However, many of the same arguments discussed before about the effect of the military supervising traditional civilian functions would apply. In addition, given the primary DoD focus on national security, DoD resources would be subject to being recommitted to national security threats and away from supporting the persistent effort to identify federal response resources.

The FCO and PFO positions both suffer from the fact that these positions are response oriented and have little authority during the mobilization stage. Neither position likely has the gravitas necessary to lead the identification of federal resources given the senior leadership buy in necessary across the federal government. However, it could be hoped that FCOs, or PFOs, should the position be functionally restored, be a part of the effort to identify and organize federal response resources to give them additional

³¹¹ Department of Homeland Security, “About the Office of Operations Coordination and Planning” (n.d.), <http://www.dhs.gov/about-office-operations-coordination-and-planning>.

visibility and expertise in the capabilities they may eventually be expected to utilize when responding to a catastrophe.

Last is the status quo. Given that the federal government, DHS, and FEMA have so far yet to create a comprehensive government-wide process to identify federal response resources as evidenced by their failure to issue the Federal Preparedness Report and the buried Catastrophic Resource Report, it may be the least effective of any of the options. Put another way, it is likely none of the other options would be worse at identifying, preparing, and utilizing the full spectrum of federal capabilities, but all might have the potential to do so more efficiently than the status quo.

The key task to organizing these identified federal response capabilities is capturing them in appropriate plans. Imagine two primary sets of capabilities, the first would be a revival of the CIS,³¹² organized by NPG core capabilities, that forms a master list of all identified federal response capabilities. The second would be more specialized lists of capabilities, again organized along core capabilities, necessary to execute all federal operational plans. Each capability would be captured in a PSMA. Once a master list of capabilities had been established, likely in the CIS, planners could simply refer to this master list to draw the necessary capabilities needed to solve identified problems and to support federal planning efforts.

The order of federal agencies and arguments for identifying federal response capabilities essentially mirrors the arguments for organizing them although DoD's significant planning resources would be of particular use for organizing federal capabilities. In addition, only FEMA may mission assign other federal agencies and is specifically charged with creating PSMA^s.³¹³

Unlike identification and organization, which are steady state, continuing actions, coordination, and direction, while practiced prior to an event, occur upon the threat or actual occurrence of a catastrophe. In other words, the FCO and PFO positions, which

³¹² See footnote 232 on the function of the CIS.

³¹³ Even if the President redelegated FEMA's Stafford Act responsibilities, the HSA provides that the President shall ensure through the FEMA Administrator the creation of PSMA^s and in its definition of MAs, states only FEMA may issue MAs. See 6 U.S.C. § 741(5) and § 753(c).

have tenuous ties to the first two criteria, are in a much better position to do these activities. However, given the current status of the PFO, its ranking is based on its current neutered powers, which makes it a poor choice for both these activities. For instance, the statutory inability of the PFO to command the position of FCO makes it impossible to say the PFO could actually direct the action of all federal civilian response efforts.

The key distinction between coordination and direction could probably be stated that in the former, it is mainly a matter of deconfliction and situational awareness while the latter requires the more difficult step of prioritization of resources. Prioritization could occur in either external resources flowing to a federal agency, at the expense of them being withheld from other agencies that could also utilize those resources, or in the internal prioritization of an agency's resources through ordering it to expend them on an activity that it would not necessarily have engaged in on its own accord.

The ranking of agencies under the two criteria do not necessarily mirror each other. For instance, while the FEMA Administrator might be better suited to coordinate federal agencies, it is essentially what the Administrator does right now, directing agencies to act, especially when they would not do so on their own, requires a significant expenditure of political capital. In this case, the DHS Secretary might have more success than the FEMA Administrator.

The last criteria, Engaging the Whole Community, is a reminder that the federal response does not occur in a vacuum, and in many cases, capabilities found outside the federal government will form the crux of the response to an existential catastrophe. These capabilities can be found amongst state, local and tribal governments, the private sector, non-governmental entities, voluntary organizations and individual citizens. The Whole Community must be engaged for two reasons to mobilize, coordinate, and direct the federal response effectively. The first may be one of law.

Federal disaster law, premised upon the Tenth Amendment and embodied by the Congressional findings and declarations in the beginning of the Stafford Act, places the

federal government in a supplemental role to state governments. An existential catastrophe may change this paradigm. For instance, if a state government is completely incapacitated, the federal government, under its Constitutional guarantee to provide a republican form of government to its citizens, might become the first responder to the existential catastrophe, which is even more likely if, as stated in the definition of an existential catastrophe, traditional first responders are all survivors and victims and unable to respond. However, it is not guaranteed that an existential catastrophe would destroy state governance, and to presume so is probably inconsistent with the basic division of powers between state and federal government.

The second reason is one of efficiency. The current FEMA Administrator, Craig Fugate, often invokes a story of once seeing FEMA set up a distribution center in the parking lot of a functioning Wal-Mart. Using a holistic approach that recognizes all the nation's resources, wherever they may be found, is essential as in an existential catastrophe demand will likely outstrip available capabilities and resources, and redundancy must be minimized. This type of situation also recognizes that the federal government has few tools to direct or prioritize the deployment of non-federal capabilities and is best suited, and most cases limited by law, to playing the role of coordinator to provide national unity of effort. By not replicating the work of the Whole Community, federal resources and capabilities can flow to underserved areas and gaps resulting in a broader delivery of disaster relief services.

Considering FEMA's visibility and engagement at all levels of government, non-governmental organizations, the private sector and citizens, the FEMA Administrator is uniquely placed to execute a concept he is credited with creating. In addition, since the Whole Community considers actors outside the government, the FCO position probably has a greater position of influence than it has within the federal government. FCOs have now been a public face for federal disaster response for over 43 years.

4. Public Acceptance

- Rank Order:
- (1) Status Quo
 - (2) FEMA Administrator
 - (3) DHS Secretary
 - (4) USNORTHCOM
 - (5) PFO
 - (6) FCO
 - (7) Lead Federal Agency

The final criterion is public acceptance and its key factor is trust. The public must place its trust in two questions. The first is that plausible existential threats to the nation exist, and second, that providing unity of command for the federal civilian response will result in tangible benefits for them. The first question would be easy if it was solely linked to actions in response to an existential catastrophe. However, adequately mobilizing, coordinating, and directing the federal response requires numerous activities in the absence of a specific threat. The federal government must identify and organize its own capabilities while planning on how to integrate them with the capabilities that exist outside the federal government, which means the answer to the first question of trust is principally a matter of education. Currently, no comprehensive campaign is available to educate the public about risk. Even when such information is obtainable, it is often shielded from the public, such as the Strategic National Risk Assessment (SNRA), and in no case was a sustained, public awareness campaign ever in existence.³¹⁴ The same can be said for FEMA's MOM, which has never been officially delivered to the public. While some progress has been made with events like the Great ShakeOut,³¹⁵ nonetheless, the

³¹⁴ Strategic National Risk Assessment, “The Strategic National Risk Assessment in Support of PPD 8: A Comprehensive Risk-Based Approach toward a Secure and Resilient Nation,” December 2011, <http://www.dhs.gov/xlibrary/assets/rma-strategic-national-risk-assessment-ppd8.pdf>. An unclassified overview can be found at this link.

³¹⁵ ShakeOut, “Shakeout Regions and Current Registration Levels” (n.d.), <http://www.shakeout.org/>.

federal government has never engaged in a long form conversation with the public on risk. Until this occurs, the public will probably continue to favor the status quo.

If, however, the federal government did begin to implement unity of command over the federal civilian response; those positions, which have the most contact with the public, would likely receive the greatest level of trust if only based upon their familiarity, which favors the FEMA Administrator whose role places him in contact with officials across the public and private spectrum. The DHS Secretary also fits this criterion; however, their contacts are more diffuse including intelligence and law enforcement. These additional duties belonging to the Secretary could also be slightly detrimental to public trust as people may have reservations that disaster relief activities could also be used for law enforcement purposes. For instance, the DHS Secretary includes immigration enforcement in their portfolio. While federal law ensures all persons, regardless of immigration status receive emergency assistance,³¹⁶ certain populations and organizations may be uneasy working on emergency response issues with the Secretary charged with enforcing immigration law. These concerns may even be grounded in some truth since FEMA is part of DHS and interagency information sharing rules amongst departments in the same agency are much less onerous than those between separate agencies.³¹⁷ The Secretary's law enforcement powers may also be of concern to those suspicious of federal power.

Similar to the DHS Secretary, USNORTHCOM might also suffer from some of the same questions if they became the public face of the federal civilian response. While the DoD is generally seen as an effective organization,³¹⁸ nonetheless, significant questions would arise about using them domestically in this role as explained earlier. Due

³¹⁶ See 6 U.S.C. § 1621, which allows any person to receive “short-term, non-cash, in-kind emergency disaster relief” regardless of immigration status.

³¹⁷ See 6 U.S.C. § 552a.

³¹⁸ Gallup Consulting, “In the Public We Trust, Renewing the Connection between the Federal Government and the Public,” November 2008, <http://www.ourpublicservice.org/OPS/documents/InThePublicWeTrustNov24.pdf>.

to their greater exposure and rank, the PFO position might actually have an advantage over a FCO. LFAs would create a problem of consistency. With numerous agencies each leading their own subject matter area, it would likely diffuse the overall federal message and make it more difficult to create a coherent and consistent picture of the federal response to the public.

5. Final Ranking

- (1) FEMA Administrator
- (2) DHS Secretary
- (3) Status Quo
- (4) USNORTHCOM
- (5) FCO
- (6) PFO
- (7) Lead Federal Agency

	Status Quo	DHS Secretary	USNORTHCOM	FEMA Administrator	PFO	FCO	Lead Federal Agency
<u>Legal Compliance</u>	3	2	5	1	7	6	4
<u>Political Acceptance</u>	2	3	3.75	2.5	6	6	5.25
President	1	2	3	4	5	7	6
Congress	4	2	3	1	7	5	6
Federal Agencies	1	3	5	4	6	7	2
States	2	5	4	1	6	3	7
<u>Efficiency in Mobilizing, Coordinating and Directing</u>	5.6	2.2	4	1.4	5.2	3.6	6
Identifying federal Response Capabilities	7	1	4	2	6	5	3
Organizing federal Response Capabilities	5	3	2	1	6	4	7
Coordinating Federal Response Capabilities	5	3	4	1	6	2	7
Directing Federal Response Capabilities	7	1	4	2	3	5	6
Engaging the Whole Community	4	3	6	1	5	2	7
<u>Public Acceptance</u>	1	3	4	2	5	6	7
Total	2.9 (3)	2.55 (2)	4.19 (4)	1.73 (1)	5.55 (6)	5.4 (5)	5.56 (7)

Table 1. Ranking of Alternatives to Exercise Unity of Command for the Federal Operational Response to an Existential Catastrophe

Based upon the analysis of all seven choices, the FEMA Administrator appears to be best suited to exercise unity of command over the federal operational response to an existential catastrophe. In this position, the FEMA Administrator would be the senior most federal official whose sole responsibility was to mobilize, coordinate and direct federal capabilities responding to an existential catastrophe. As the alternatives were ranked, it becomes clear they separate into two tiers with the USNORTHCOM commander in between. In addition to the FEMA Administrator, the DHS Secretary also appears to be a strong choice, although their strategic responsibilities as part of the NSC may make it difficult for the Secretary to exercise this function. Interestingly, the other top tier choice is simply to retain the status quo relying on unity of effort and dispersed responsibility, which raises the question whether giving unity of command over the federal operational response to the wrong person or position may have a detrimental effect on the federal operational response.

In the next chapter, this thesis reimagines the FEMA Administrator's response to Hurricane Katrina but with a new model of federal operational interagency response in place. Read in context with the serious defects in the mobilization, coordination, and direction of the federal operational response listed in the first chapter, it might provide an example of how much more efficient the federal operational response to an existential catastrophe might be with the implementation of unity of command.

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V. REVISITING UNITY OF COMMAND UPON THE FEDERAL RESPONSE TO HURRICANE KATRINA

The following assumes that the FEMA Administrator³¹⁹ at the time of Hurricane Katrina, Michael Brown, was vested with the authority to provide unity of command over the mobilization, coordination, and direction of the federal civilian response to Hurricane Katrina. Assumptions are made that he would have competently utilized this power and that he had the explicit support of the president, the HSC staff,³²⁰ and Secretary Chertoff. It also assumes the present legal framework, including the PKEMRA, existed at the time of the hurricane.

A. MOBILIZING FOR HURRICANE KATRINA—HURRICANE PAM

Beginning with mobilization prior to the event, FEMA embarks on a two-prong strategy to prepare for large-scale disasters. The first is a federal government wide canvassing of federal response capabilities. These capabilities, typed and credentialed, are bundled together to populate the CIS that was never issued prior to Hurricane Katrina. With the additional supervision, authority, and support of the president and his staff, FEMA is both held to a timely standard to finish the CIS and given adequate support to force the cooperation of other federal agencies as needed to complete the CIS on time.

In addition to the CIS, identified, typed, and credentialed capabilities are linked to individual PSMAs, which are used for the second prong to populate PSMAs into existing national operational plans and exercises. When the Hurricane Pam exercise is held beginning in July 2004, it is no longer a “bridging exercise.”³²¹ Instead, it is able to exercise PSMAs that have been previously identified for hurricane response and for

³¹⁹ At the time of Hurricane Katrina, the FEMA Administrator was still called a Director and also held the position of Undersecretary of Emergency Preparedness and Response.

³²⁰ The staffs of the HSC and the NSC were not combined into the NSS until the Obama Administration, at the time, it would have been the HSC staff.

³²¹ “The intent of Hurricane Pam was to produce the preliminary “bridging document” addressing catastrophic hurricane response between state and local plans and the National Response Plan. The Hurricane Pam documents were designed to serve as a foundation for more detailed catastrophic planning in the future, and to provide the architecture for an integrated catastrophic plan.” U.S. Senate Committee on Homeland Security & Governmental Affairs” (n.d.), www.hsgac.senate.gov/download/012406beriwal.

catastrophic incidents. Participants are required to actually simulate the steps necessary to activate and deploy resources, and using exercise play, develop estimated times of arrival. The exercise forces federal agencies to address real time identified gaps in capabilities by resorting to a combination of PSMAs not identified in planning efforts, non-traditional capabilities, and contracts with the private sector.

The FEMA Administrator is able to use their authority to require the adequate level of federal agency personnel to participate. Federal agency leaders who attend the exercise are the same caliber of leadership who can instantly command additional resources from across their agencies a year later during Hurricane Katrina. This exercise allows these leaders to both simulate difficult decisions, such as stripping agency resources from their primary duties to support the response to the hurricane, and also helps familiarize them with current plans, other leaders, and their own agency's capabilities.

The exercise also acquaints leadership with the role of the ESFs and forces each ESF to identify resources from primary and supporting agencies more efficiently. ESFs are now given a standard for choosing from among existing PSMAs, identifying additional federal resources in real time, and additional contracting duties to fulfill requests for resources not found in the federal government.

With specific capabilities to be exercised, participants likely discover gaps in coordination a year prior to Hurricane Katrina. ESF #13 Public Safety and Security having been forced to collaborate during the identification, typing, and credentialing of capabilities, has identified and addressed the lack of law enforcement coordination between DHS and the Department of Justice (DOJ) prior to Hurricane Pam. Similarly, ICE, CBP, and FPS are all pressed beforehand to validate their roles within ESF #13 and what capabilities they have available to support the federal response. When ESF #9, Search and Rescue (SAR), simulates the need for aerial SAR, which draws resources from both the DoD and the USCG, the two agencies realize they have not yet prepared to integrate air space operations and deconfliction; if they have not already.

The final change to Hurricane Pam is the FEMA Administrator has the authority and support to direct federal agencies to take specific, identified steps to address gaps and shortfalls identified during the exercise. If, after this, final remediation process gaps and shortfalls remain that cannot be addressed from identified federal capabilities or contracting, FEMA now provides Congress this information through the Federal Preparedness Report and Catastrophic Resource Report. The FEMA Administrator supervises this process through a fortified ESFLG that provides the Administrator a forum to determine the progress of federal agencies and a link to the HSC for those issues that require strategic level decisions.

B. COORDINATING AND DIRECTING THE FEDERAL RESPONSE TO HURRICANE KATRINA

As the threat of Hurricane Katrina grows, the federal government, led by the FEMA Administrator, begins preparations to assist State governments. Using the ESFLG, the FEMA Administrator, on their own initiative, is able to convene senior federal operational leadership, which replaces the need for the IIMG. As the threat grows, the FEMA Administrator and the ESFLG develop specific requests for additional resources to be released to them and identify the need for the president and the cabinet to provide strategic leadership and decisions. Accordingly, the FEMA Administrator, now leading the ESFLG and in the role of principal advisor for emergency management to the president, the HSC, and the DHS Secretary, asks the president to convene the HSC, possibly including all cabinet members, as much as two days prior to landfall in Louisiana and Mississippi. At this meeting, the FEMA Administrator, along with the National Hurricane Center, provide the president and the HSC with specific information on the threat, efforts under way, and identified gaps. The FEMA Administrator makes specific requests for additional resources beyond what has been released to the ESFLG leadership and asks the president to reach out preemptively to affected governors with specific questions to ask them about their capabilities and preparedness activities that could not be addressed by the ESFLG and the FEMA Administrator in their conversations with state officials. With future needs already being anticipated, the Secretary of Defense can begin balancing national security interests in Iraq and

Afghanistan with the need to support response efforts in Louisiana and Mississippi, such as determining what level of strategic airlift to make available to response efforts.

After landfall, only one federal point of coordination exists for the federal response as the FEMA Administrator operationalizes the ESFLG and moves forward with the UACG. Consisting of the same federal leaders who run the ESFLG plus additional federal officials necessary to draw upon all anticipated federal resources, the FEMA Administrator provides a single face to the federal response. The PFO and DoD Task Force do not have two competing federal organizations.

When the Administrator is provided information directly on the day of landfall that levee breaches in New Orleans have changed the facts on the ground from a hurricane to a flood, he does not need to ask permission for additional assistance. Instead, working through the FCO for Louisiana and with the USACE and ESF #3, on his own initiative, he works to see that resources are immediately set in motion to repair the levees while ensuring ESF #9 begins SAR missions. Alongside his FCO, he simultaneously contacts state officials including the SCO, and likely the governor and mayor of New Orleans (if he can be reached), to inform them of the information and ensure federal resources support the state in the response. Only then does he notify the DHS Secretary and HSC of the levee breach as a point of situational awareness and as a warning more federal resources may need to be released shortly to respond to the new facts on the ground. The Administrator leaves the details of such actions for his FCO to execute who exercises authority delegated from the Administrator and in conjunction with state officials as they work to support the needs of incident commanders and area FCOs directly. Mayor Nagin no longer has to phone the president for busses; instead, he informs the FEMA Administrator directly who is able immediately task ESF #1 to provide the necessary transportation resources, or better yet, delivers the request to the FCO who can draw upon all the resources released to him through the ESFLG.

As New Orleans floods the day after landfall and the need for SAR and evacuations is more clearly understood, the FEMA Administrator is able to force the issue of evacuees located at the Superdome and the Convention Center in New Orleans with the mayor and governor. Instead of self-deploying, LTG Russel Honore has already

fallen in with the UACG and is tasked with directly supporting FEMA's efforts to assist the state and city in evacuating these locations. A one-day delay in beginning evacuations and another day's delay when LTG Honore stopped FEMA's plans for evacuation no longer occurs. Secretary Chertoff, instead of being asked by reporters to remark on the images of marooned evacuees, is thus able to report on specific federal actions, taken in coordination with state and city officials, and which are playing out on TV screens around the world. When ESF #8 and HHS fail to begin removing bodies, the FEMA Administrator orders them to do so, and alleviating any questions of authority, invokes the broad emergency response powers found in Section 403 of the Stafford Act to approve the work. Within three days from landfall, all evacuees have been relocated from the Superdome and Convention Center, SAR efforts in the 9th Ward are finishing up, and recovery efforts are already beginning to overtake the response.

While the response focuses on New Orleans and Louisiana, the FEMA Administrator is able also to prioritize those labors with parallel efforts undertaken in Mississippi. Through the UACG, he is able to prioritize requests for assistance from both states and support them with additional resources. When gaps in resources are located, he can now inform the HSC and the president of the need for additional federal resources not already released to the members of the UACG and the FEMA Administrator. Concentrating on these actions, and providing the public face to the nation, the FEMA Administrator leaves his FCOs, consistent with his intent and that of the governors, free to conduct operations alongside state and local officials.

Clearly, these results occur in hindsight and assume the actors would have worked harmoniously and quickly to address the catastrophe that unfolded. However, key points might have changed the entire response to Hurricane Katrina. The first is the empowerment of the FEMA Administrator. When presented a problem or request from the state, such as the need to begin a major evacuation and SAR effort, he already has the resources available to begin those efforts without asking for permission or can quickly collect them from members of the ESFLG. The only need to speak to superiors is to keep them informed and to make specific requests for additional resources required or

anticipated. Second, as the single POC for the federal response,³²² no confusion occurs amongst state and local officials about who is in charge of the federal response and where their requests for assistance should be directed. Third, in those cases in which federal agencies have failed to make adequate preparations or would not act under the own accord, the FEMA Administrator has the power to direct and reimburse federal agencies to take actions authorized under the Stafford Act, including actions that might fall under the existing authorities of other federal agencies. Finally, all this allows the president to have a direct link to the federal response through the FEMA Administrator. As necessary, the president can directly communicate their intentions to the Administrator, and in conjunction with their staff, supervise their performance in line with the president's expectations and weighing the strategic decisions entailed by such a catastrophe. In short, the president now has a way to influence events on the ground directly that they did not previously have.

³²² As a natural disaster, no need for crisis management is needed; accordingly, federal law enforcement needs are in support of consequence management, led by the FEMA Administrator and the integration and presence of the senior DoD commander as part of the UACG eliminates the need for a separate DoD command.

VI. WHAT A NEW SYSTEM OF MOBILIZING, COORDINATING AND DIRECTING THE FEDERAL RESPONSE TO AN EXISTENTIAL CATASTROPHE MIGHT LOOK LIKE

If the federal government adopted unity of command for the federal civilian operational response to an existential catastrophe, what type of federal interagency system would support it and be best situated to take advantage of its benefits? First, it would need leadership and a forum for that leadership to be exercised. It has been argued that the FEMA Administrator is best suited to provide this federal operational leadership. If so, that provides the answer to who will provide this leadership and direct connection to the president. While the president and the cabinet, with the support of the NSS concentrating on strategic issues, the FEMA Administrator exercises their authority to guide the federal civilian operational response in line with the expectations of the president. Second, it would need a system to exercise this authority. Third, this authority would need to be integrated into preparedness, the mobilization stage.

A. A REVITALIZED EMERGENCY SUPPORT FUNCTION LEADERSHIP GROUP

Beginning with preparedness, a revitalized ESFLG would be the focal point for exercising unity of command prior to catastrophes. The ESFLG charter would be changed to reflect its new purpose. First, membership would be based upon real operational authority. All ESFLG members must have the ability to control the assets of their particular department or agency. Alternatively, for larger agencies, members must have the authority to control at least an initial allocation of agency resources without needing to ask for further permission to deploy them. The steady state ESFLG would be chaired either by the FEMA Administrator, or more likely, the Associate Administrator for Response and Recovery, or the Assistant Administrator for Response who is the current ESFLG chair. Unlike the current ESFLG, a SFLEO and a senior member of USNORTHCOM, possibly the Deputy Commanding General or the Director or Deputy Director of its Joint Operations (J-3), who would perform two roles, would also be designated. The first would be to coordinate all crisis management activities that fall

under the jurisdiction of federal law enforcement and military authorities with the consequence management activities of the civilian ESFLG members. Second, each also serves as their department's senior ESFLG representative for consequence management activities. In the case of DOJ, as the primary ESF agency for ESF #13, and the DoD as a critical ESF Support Agency for multiple ESFs.³²³ While not co-chairs of the ESFLG, the SFLEO and NORTHCOM leaders each represent statutorily distinct responsibilities and report directly to the president for law enforcement and national security.

All primary ESF departments and agencies would be required to attend each monthly ESFLG meeting along with crucial supporting agencies, such as the DoD. All supporting agencies would be prepared to attend as necessary and at least one meeting per year would require the attendance of the full membership; all federal agencies with responsibilities under the NRF or supporting national plans. Each ESFLG member would be appointed as the emergency coordinator for their agency as required by EO 12656. The key characteristic is that membership would not change between the preparedness and policymaking functions prior to a catastrophe, and the operational functions in anticipation of and in response to a catastrophe to allow for a seamless transition from policy making to operational decision making.

Second, the function of the ESFLG would change to emphasize the resolution of issues at the operational level. Currently, the purpose of the ESFLG is to perform as “a senior level entity that coordinates responsibilities, resolves operational and preparedness issues relating to interagency response and recovery activities at the national level, and provides planning guidance and oversight for the development of interagency response and recovery focused plans and activities.”³²⁴ The ESFLG would emphasize “resolution of issues” with the FEMA Administrator in position with the responsibility to supervise the resolution of operational level issues and with each of its members in position to execute final decisions. The ESFLG would change from a policy making body to one with operational decision-making capability and authority. With the empowerment of the

³²³ The USACE, which is part of the DoD, is currently the primary agency for ESF #3 along with FEMA.

³²⁴ ESFLG Charter dated October 22, 2010.

ESFLG, consideration may be made whether the DRG as an additional layer of bureaucracy needs to continue or whether it remains strictly a policy-making body and does not interfere with the ESFLG's direct connection to the NSC and the NSS during the response to catastrophes.

As an IPC, the DRG is “attended by Assistant Secretary or equivalent level and Deputy Assistant Secretary or equivalent participants respectively from the departments and agencies that make up the HSC deputies. For some IPCs, such as the DRG that handles response and preparedness issues, the membership may be slightly larger to account for the number of departments and agencies involved with those issues. The attendees are expected to be able to speak on behalf of their departments and agencies and provide resources.”³²⁵ As previously stated, the ESFLG membership should already be able to utilize all the resources of their agency or at least have an initial allocation of resources under their command. If this requirement makes membership of the ESFLG and the DRG duplicative, they should be consolidated. However, a significant increase in responsibility would result for departmental assistant or deputy assistant secretaries, since as their department’s emergency coordinator, they would be expected to attend monthly ESFLG meetings and be the primary operational director for their agency or department in an actual catastrophe. The answer may be to create specific agency delegations from agency secretaries or leaders to the most senior operational director in each agency as the agency’s emergency coordinator and ESFLG representative.

Delegating authority for the utilization of agency resources below the assistant secretary level would allow operational control of department resources to those most familiar with agency and department capabilities that would be used to respond to a catastrophe. However, if departmental secretaries and other agency leaders are performing their strategic functions and providing the final line of advice to the president, the assistant secretary level of agency leadership may no longer have a role. This level of agency leadership could find themselves too junior to work directly with the president and too senior to spend significant time preparing and learning to utilize their agency’s

³²⁵ Kelly Wolslayer, “Collaborative Policy Making: Vertical Integration in the Homeland Security Enterprise” (master’s thesis, Naval Postgraduate School, December 2011), 30–31.

capabilities to respond to a catastrophe. One possibility is for this level of departmental and agency leadership to concentrate on the continuity of their agency's primary mission while their most senior operational director controls their resources previously committed to disaster response and their agency or department leader provides strategic advice to the president and their staff. This structure could allow for a division of labor for both the maximum mobilization of the agency or department while still letting part of senior management concentrate on the continued affairs of the agency or department. This arrangement would be somewhat similar to the DoD model in which service chiefs can concentrate on providing advice to the DoD Secretary and the president, and provide direction to their services while leaving responsibility for the actual utilization of their forces to combatant commanders.

When an anticipated or actual catastrophe occurs, the ESFLG transitions to an UACG. Unlike the UACG, which was exercised in NLE 2010, but which does not appear to have been adopted for further use, the new UACG would be premised upon unity of command and not unity of effort. The new UACG would have an element of unified effort that would exist between the DoD, the SFLEO, and the FEMA Administrator, each responsible for their own part of the federal response over military, law enforcement, and civilian resources, respectively. Unity of command exists in the fact that within these three positions rests complete command and control of the entirety of federal resources committed to responding to the catastrophe. In turn, these three positions are supported by the emergency coordinators for ESF supporting agencies necessary to respond to the catastrophe. These supporting agency emergency coordinators provide advice to the UACG on the capabilities of their agencies and situational awareness of activities conducted under their existing authorities and coordinated through the UACG. They assume responsibility for exercising their own statutory authorities to respond to an existential catastrophe except when otherwise directed by the FEMA Administrator. Simply put, the UACG commands the entirety of all federal capabilities and authorities

made available by the president to respond to an existential catastrophe.³²⁶ The UACG cycle of operations can be identified as (1) identify the problem/situational awareness, (2) decide, (3) coordinate, (4) execute, (5) supervise, and (6) review.

At least one question for leadership of FEMA's ESFLG/UACG concept remains. The analysis of providing for unity of command over the federal civilian response to an existential catastrophe was based upon the authority of the FEMA Administrator either through the PKEMRA or as delegated under the Stafford Act. However, the FEMA Administrator must still execute their statutory responsibilities as the principal advisor to the president, HSC, and the DHS Secretary for all matters relating to emergency management in the United States. Thus, the FEMA Administrator is placed in the difficult position of being required to provide strategic advice to the president and the HSC on the one hand, and be responsible for utilizing federal civilian capabilities to respond to the catastrophe on the other. In practice, the Deputy FEMA Administrator may effectively command the UACG, using the delegated authorities of the FEMA Administrator, while the FEMA Administrator retains his primary responsibility to advise the president and the HSC, or the president may choose to switch those roles.

If this arrangement is adopted in which the FEMA Deputy Administrator is the primary operational commander for the federal civilian response, the president, the FEMA Administrator, and the Deputy Administrator will also need to determine who will be the primary conduit to the nation's governors. While this will likely be a case-by-case answer, and nothing will interfere with the prerogative of the president to deal directly with the governors, on a strictly operational basis, the FEMA Administrator might be best suited for this role, even if the Deputy Administrator actually commands the federal civilian response, and coordinates it with the crisis management activities of federal law enforcement and military authorities.

³²⁶ FEMA also has national IMATs that effectively fulfill the mission of providing a forward senior federal presence in disasters. These teams are being reorganized for the summer of 2013; however, it does not appear they will have the authority or membership necessary to be a new UACG. One possibility would be for the IMATs to continue in their role for lesser disasters, but for catastrophes or existential catastrophes, they would be supplanted by the new UACG, and the IMAT members would fill staff roles for the new UACG.

B. NEW ASSUMPTIONS AND METRICS

For the new ESFLG/UACG to be successful, it will need to change the way the federal government prepares for an existential catastrophe. To begin, the steady state ESFLG will focus on creating, issuing, and updating the federal response capability inventory and Catastrophic Resource Report. To do this, the ESFLG, with the support of all primary and supporting agencies' emergency coordinators, must inventory all their agencies capabilities. These capabilities would be grouped into three general categories. The first would be those capabilities immediately available for agency emergency coordinators to use to respond to a catastrophe and whether those capabilities could be deployed to an incident within 72 hours. The second category of capabilities would be those not currently available for utilization by that agency's emergency coordinator but which could respond to a catastrophe if released by the agency's leader or the president; in essence, the nation's strategic reserve. Third would be all other identified capabilities of an agency that do not currently support national response plans. This third category is important in that it may later lead to the identification of non-traditional capabilities found within the federal government. Categories would include both physical assets and personnel, and services. The federal response capability inventory should be reviewed every one to three years, and allow for real time updating of capabilities by federal agencies. The ESFLG/UACG would also have the important role of ensuring these capabilities focused on areas not already adequately covered by the rest of the Whole Community.

The Catastrophic Resource Report by law must be issued annually to Congress. The purpose of the report under the new ESFLG would be to explain the deficiency in resources, if any, identified to respond to a MOM event, and what is available as detailed in the federal response capability inventory. As plans become more detailed and exercised, future Catastrophic Resource Reports can focus on more specific threats or regions, for example, a major earthquake affecting the Los Angeles area, a pandemic influenza event, or a cyber attack upon the nation's energy infrastructure.

The ESFLG will also need to acknowledge and seek to address the current gap in federal response capabilities in the first 72 hours of an event. Under the current bottom up process, federal capabilities supplement state and local first responders. However, it may take up to 72 hours or more after an event before state and local responders can communicate their unmet needs to their federal partners. In existential catastrophes, state and local first responders will themselves become victims and survivors requiring federal capabilities to provide response capabilities and reestablish basic services immediately. In parallel, both state and federal governments will need to continue to expand their coordination with private sector and non-governmental capabilities in both the first 72-hour gap and beyond.

A critical function of the ESFLG will be to integrate federal capabilities with their state and local counterparts, the private sector, and NGOs. The ESFLG would have to determine if this could be done best from Washington, DC or if it should move forward as a UACG. Integration would occur through the ESFLG identifying gaps, including these parties in their planning efforts, and exercising these plans to determine what works and what problems and gaps remain to be solved. The ESFLG could also work with governors to leverage FEMA's Regional Administrators and regional planning initiatives, to pre-identify needs that can be immediately be released on agreement with the governor, prior to requests from local responders making their way up for federal assistance. For example, Hurricane Sandy showed the need to provide capabilities to restore power and provide gasoline to affected areas and first responders are especially important in dense urban areas. In the future, the ESFLG could work with the Governor of New York and their emergency management staff so that upon approval from the governor, federal agencies immediately begin to push gasoline supplies into affected areas and directly to first responders. Following the intent of the governor, federal tankers move out through affected areas in the first 24 hours, or if it is a no-notice event, the first 48–72 hours. Dividing the area up into grids, they deliver fuel daily to medical, law enforcement, and other critical facilities identified as priorities in conjunction with state officials, which closes the gap in time when local responders are unable, or unavailable, to request specific assistance, yet follows the parameters for assistance provided by the

governor. These preplanned activities can also be integrated into federal, state, and local operational plans based on the type and size of event and could be automatically triggered for an existential catastrophe immediately upon approval of a Stafford Act declaration.

The role of ESFs should also be clearly defined. In the 1980s under the national earthquake plan, the role of ESFs appeared in federal regulations, but did not continue with the adoption of the FRP, NRP, and NRF. Currently the role and responsibilities of ESF primary and support agencies can only be found in the NRF, which has not been signed by the affected agencies, as in the case with the FRP and NRP.³²⁷ Without the support of regulations, EOs or even a signed charter, the role of ESFs is shaky at best and liable to subjective interpretation based upon individual agency's needs and culture. With such an unstable foundation, it is no wonder that current federal response efforts lack supervision and accountable metrics both pre and post event as no established standard exists to which to hold ESFs.

Finally, while not necessarily rising to the level of existential catastrophes, the ESFLG must also address how Stafford Act coordination structures align with coordinating non-Stafford Act events. For instance, neither the Exxon Valdez and British Petroleum Macondo oil spills nor the 2009 H1N1 pandemic influenza outbreak resulted in Stafford Act declarations. The ESFLG, and ultimately, the DRG (if it continues to exist), the NSC and the president need to determine how to leverage the Stafford centric coordination structures and capabilities for these events. In time, the ESFLG might grow beyond its Stafford centric response and expand to cover the coordination and response to all national level incident responses, although the response to non-Stafford events would continue under the leadership of other agencies.

The ultimate objective of these ESFLG efforts would be to meet the FEMA Administrator's goal of getting enough federal capabilities to a catastrophe within the first 72 hours of the event to begin making a difference on the ground and to engage the nation's Whole Community to maximize the country's response to an existential catastrophe. The ESFLG accomplishes this goal by providing direction and identifying

³²⁷ Like the NRP and the FRP, the NRF was approved under an interagency process; in this case, convened under the authority of PPD-1.

and delivering resources into the hands of incident commanders while helping integrate them with existing capabilities of state, tribal, and local governments, the private sector, and citizens. For critical capabilities for which demand exceeds available federal resources, the ESFLG can serve to prioritize the delivery of federal capabilities. Meanwhile, incident commanders are delegated maximum flexibility to integrate and employ these resources and capabilities, and are encouraged to use out of the box asymmetric means to deliver these capabilities and to coordinate their use with the Whole Community.

C. MISSION ASSIGNMENTS

A key tool for the ESFLG will be harnessing the tool it will use to employ the capabilities identified. MAs will need to be integrated with capabilities as they are inventoried under the supervision of the ESFLG, which is consistent with PPD-8 and the move towards capability-based planning. The process might look as follows. The ESFLG approves a list of capabilities from a particular federal agency for use in disaster response. Those capabilities are then subject to a cost estimate, which also incorporates subjective factors, such as length and location of deployment to form the basis of a PSMA, which, on this scale for the first time, includes a rational basis for estimated costs for employing federal capabilities.

In addition, the MA program needs to be upgraded significantly within FEMA. Until just prior to Hurricane Sandy, the FEMA MA program was led by a GS-13 in the FEMA Response Business Management Division. It has since been moved to the Response Coordination Branch but is still staffed at the GS-13 level. A loose analogy would be if a major were the Director of Operations, or at least its order writing function, for the DoD Joint Chiefs, a position currently held by a Navy Vice Admiral.

In conjunction with national planning efforts at FEMA and DHS, each national operational plan incorporates PSMAAs to execute these plans, and each plan is required to be accompanied by an annex listing identified PSMAAs. Hopefully, as part of this process, redundant capabilities will be discovered across federal agencies that can be compared for cost and efficiency, which is currently lacking. Taking this one step further, it might

eventually form the foundation for a system in which MAs can be put up for bid amongst federal agencies that have a short time to provide the most efficient capability to match the requested mission assignment.

The ESFLG forms the fulcrum for moving to capability-based MAs, joining them to current and future plans, exercises, and operations. It will form a central foundation of knowledge in the ESFLG membership and its staff that creates a deep pool of knowledge in what existing capabilities (each matched with a PSMA) are found in the federal government, how best to implement them holistically, and where might non-traditional sources of capabilities be found. It may also lead to new ways to identify capabilities, such as using Office of Personnel Management (OPM) databases on federal employees to identify unique skills useful in catastrophes, such as engineers, doctors, and veterinarians in organizations that do not normally provide those services. The addition of MAs to the ESFLG portfolio also supports the argument that the FEMA Administrator should have final responsibility for directing the ESFLG as MAs are unique to FEMA and cannot be issued by other federal agencies.

D. CONGRESS

All these solutions have so far focused on issues internal to the Executive Branch, but Congress also plays a role. In addition to providing the statutory foundations for unity of command and giving the president, and to a lesser extent the DHS Secretary and FEMA Administrator, responsibility for the federal government's response to catastrophes, it also funds these activities and oversees their execution by the Executive Branch. For the latter, Congress has not shown a critical interest except after major catastrophes, such as Hurricane Katrina, or 9/11. For one, Congressional oversight, as has been repeatedly shown, is fractured among as many as 108 committees overseeing DHS and homeland security.³²⁸ The last significant contraction in homeland security oversight probably occurred in 1994 when the House Armed Services Committee relinquished

³²⁸ Joshua D. Clinton, David E. Lewis, and Jen Selin, "Influencing the Bureaucracy: The Irony of Congressional Oversight," *Social Science Research Network*, May 3, 2012, <http://ssrn.com/abstract=2050734>, 1.

oversight authority over civil defense programs with the repeal of the Federal Civil Defense Act of 1950 and its restatement as Title VI of the Stafford Act.³²⁹

Even when Congress determines that homeland security activities fall short of their statutory responsibilities, Congress rarely, if ever acts. For instance, in a letter dated February 26, 2010 to the DHS Secretary from the United States Senate Committee on Homeland Security and Governmental Affairs, the committee noted DHS and FEMA in their draft NDRF had failed to meet the requirements set forth for a National Disaster Recovery Strategy in 6 U.S.C. § 771. FEMA went ahead and issued the NDRF anyway to no discernible response from Congress. Neither did FEMA's National Disaster Housing Strategy issued on January 16, 2009 meet the requirements of the National Disaster Housing Strategy found at 6 U.S.C. § 772. In addition, DHS and FEMA have never issued the previously mentioned federal response capability inventory, and has belatedly issued a stovepiped Catastrophic Resource Report.

E. IMPLEMENTATION

To implement these changes, they would need to be captured by the Executive Branch at multiple levels of responsibility. First, the president should update HSPD-5 with a new PPD that makes the FEMA Administrator responsible for conducting the federal operational response to an existential catastrophe under the direction and supervision of the president and the NSC/HSC. This new PPD should also inform the federal interagency community that the ESFLG would be the single forum to adjudicate operational level disputes during a response under the Stafford Act, with the FEMA Administrator having final decision-making authority. The new PPD should tie itself to EO 12656 and remind federal agencies of their duty to support planning and preparedness efforts. It should also require federal agencies to provide representatives to the ESFLG who have the authority to direct all agency resources released to the federal response

³²⁹ *National Defense Authorization Act for Fiscal Year 1995*. See also House Report 103–499, May 10, 1994, where the committee report stated, “The committee believes it should get out of the civil defense business for two reasons. First, the program has lost its defense emphasis. The threat of attack is no longer the driving force behind the program. Rather, the chief threats today come from tornadoes, earthquakes, floods, chemical spills, and the like. Second, there are too many House and Senate committees (over 20) with legislative jurisdiction over FEMAs activities. This has fragmented oversight of the agency and hampered its ability to perform effectively.”

effort. The PPD should encourage agencies to give these ESFLG members authority to activate critical federal response capabilities immediately without further direction. It should also address the role of intermediate senior officials during a response who are not part of the NSC/HSC but are senior to the ESFLG members. As suggested previously, the new PPD might suggest these officials be responsible for continuing the normal operations and responsibilities of their agencies.

The new PPD should account for policy functions at the operational level. In other words, the PPD should also describe whether for non-operational policy decisions, essentially those matters handled by the ESFLG when not responding to an existential catastrophe, additional policymaking groups should be inserted between the ESFLG and the president, and the NSC/HSC. A role for the DRG might be retained, but limited to non-operational decisions only.

The final step to implement these recommendations within the federal government would be to update FEMA's regulations on MAs. At a minimum, these new regulations should more accurately reflect the types and uses of MAs. They also should amend the reimbursement provisions to allow the FEMA Administrator to reimburse other federal agencies for disaster response work directed by the Administrator under Sections 402 and 502 of the Stafford Act.³³⁰ It is also suggested that MAs be organized under the specific work they are intended to support. For example, if a federal agency were ordered to construct long-term housing for evacuees, they would receive a "408 Direct Federal Assistance (DFA)" MA, which reflects the specific Stafford Act section authorizing that type of work.

The other essential implementation requirement for these recommendations would be funding. Specifically, Congress would have to continue to provide flexibility in its appropriations language for the DRF. A need might also arise to ask Congress for additional flexibility amongst federal agencies to transfer funds from existing accounts to

³³⁰ The actual mission assignments should also reflect the specific authority for their work, generally found in Sections 403 and 502, but for more specific work requests might be found in other sections such as 407 for debris removal and 408 in building long-term housing for evacuees.

support preparedness efforts conducted under the ESFLG and the FEMA Administrator, and possibly, include additional funds specifically for these efforts.

F. CONCLUSION

Through a combination of geology, weather, war or malevolence, the United States will eventually face an existential catastrophe. Its effects will cascade throughout the country and put its future at risk. State and local government resources will be overwhelmed and the federal government will need to supplement its response efforts immediately. The federal response to an existential catastrophe will likely see it forced to assume the role of first responder as local responders are either victims, survivors, or otherwise incapable of conducting an adequate response to the catastrophe.

The history of the federal government's response to major disasters has generally been perceived as poor, and in some cases, worse. For an existential catastrophe, the federal government, and most importantly, the president, who is responsible for executing the federal response, will not have the luxury of time to gather resources and capabilities. It will not have the time to wait for perfect situational awareness. The president will have an exceptionally short window to bring the weight of federal resources to bear before the nation's trust deteriorates. In times of crisis, the president holds a unique position in American life, and the president's response to an existential catastrophe will define their legacy and the nation's future. Most importantly, immediate survivors and the entire nation, its Whole Community, will need a swift but efficient federal response to supplement their efforts, where they have already begun, to fill in the gaps where they have not.

The president needs to be able to balance their need to provide strategic direction to the nation's disaster response, while addressing the continuity of the federal government's functions including other critical responsibilities, such as national defense. It has been repeatedly demonstrated the federal government's current process for mobilizing, coordinating, and directing the federal operational response is inadequate. This process was developed over time and has resulted in an uneven level of supervision by the White House, planning and preparedness efforts unsynchronized with operations,

and a lack of clear accountability below the president. The current system of federal interagency coordination through unity of effort exacerbates these issues stemming from the urgency of time, capabilities, and accountability.

Historically, the federal response to disasters improved when the president took an active part in supervising the federal response.³³¹ The appointment of Frank Carlucci in Pennsylvania and Admiral Thad Allen in the Gulf Coast at the least led to the perception the federal government was now operating more efficiently with the direct support of the president. However, the sheer volume of the president's responsibilities makes it impossible to actually manage the federal response, certainly at the operational level. This thesis has argued that the most efficient way for the president to supervise the federal response to an existential catastrophe is to delegate their authority over the federal response for operational decisions to a single federal official to allow the president and the cabinet, likely through the NSC,³³² to focus on strategic decisions and to determine how much of the federal government will pivot to respond to the existential catastrophe while still maintaining other key government functions. While unity of command may not be the solution to an existential catastrophe, it may be a more efficient way to a solution. When faced with the largest humanitarian relief effort in U.S. history, Western Europe at the end of the Second World War, the U.S. Army, utilizing unity of command, was able to leverage its ability to mobilize, coordinate and direct millions of service members to deliver assistance to millions of refugees, the homeless, and POWs.

To determine which federal official should be selected, criteria from historically reoccurring themes for disaster response were identified. Seven different federal officials or positions with historical relevance to managing federal disaster response operations were chosen as alternatives to receive this authority. Based upon the criteria, the FEMA Administrator was chosen from among the seven different options as best positioned to accept this responsibility. The FEMA Administrator, or their deputy, would lead the portion of the federal operational response formerly known as consequence management.

³³¹ See footnotes 7 and 9.

³³² The current President has essentially utilized the NSC for functions previously handled by the HSC and adjusted the NSC accordingly for homeland security issues.

Supported by an empowered ESFLG, whose members have the authority to direct all agency capabilities released to respond to the catastrophe, they will control all federal civilian resources released to them by the president and his cabinet. The chain of command from the president to incident commanders would be reduced to a minimum while these commanders will be empowered to use their best judgment in utilizing the resources and capabilities provided to them. Federal law enforcement officials and the DoD will both support consequence management activities and coordinate their crisis management actions with the FEMA Administrator and their federal civilian partners. Implementing these responsibilities through unity of command, the FEMA Administrator could provide the best opportunity for the president to provide the level of federal leadership necessary to confront the catastrophe.

The authority for the FEMA Administrator to realize this new responsibility has been demonstrated through an analysis of key provisions of the Stafford Act. This authority, in conjunction with the Administrator's inherent authority provided under the PKEMRA, and coupled with funding available through the DRF, would provide the FEMA Administrator with the tools necessary to coordinate and direct the federal operational response. Further, these same tools would allow the Administrator and the ESFLG to execute the necessary preparedness activities to ensure the federal government maximized its opportunity to meet an existential catastrophe immediately and efficiently. These preparedness activities would include identifying, organizing, and exercising federal capabilities. The ESFLG would capture the results of these activities in the federal response capability inventory, and Catastrophic Resource Reports required by law, and integrate them into planning and response efforts by coupling identified capabilities with PSMAs.

Providing the FEMA Administrator the authority to exercise unity of command over the federal operational response could still be uncertain. For this to occur, Congress, state governments, and federal agencies would have to buy in to the concept. While implementation of unity of command might bring the prospect of additional funding to federal agencies, they might also see it as a threat to their traditional responsibilities and the current flexibility they have in current ESF structure. While state governments might

appreciate the consolidated authority, which makes it easier to route their requests for assistance or to coordinate with them, they may also feel hesitant to embrace a new system. The president may also hesitate in implementing it given no immediate pressure currently exists to do so, and by setting standards for preparedness and response, the failure to meet these standards may be used against the president. Moreover, the president may enjoy the relative ad hoc nature of the current system. Finally, with no historical example of an existential catastrophe striking the United States, no one can be quite sure of the effects of these changes until the time to implement them arrives. The creation of this new system for the federal interagency response to an existential catastrophe will also require significant changes to EOs and presidential guidance. If any of these dynamics fail, it will be difficult to implement the new system.

Despite these challenges, it appears the current system to support the federal operational response to an existential catastrophe is inadequate. By adopting unity of command, for the first time, the federal government would have a true measure of its response capabilities, as measured against a standard found in the maximum of maximums, and a forum and process to identify, organize, and release to incident commanders the resources and capabilities necessary to respond to an existential catastrophe that spans the mobilization, coordination, and direction of federal capabilities. It could also provide the medium to expand the coordination and integration of federal response capabilities greatly with the Whole Community. Through unity of command for the federal civilian operational response to a catastrophic disaster as exercised by the FEMA Administrator, and in unity of effort with federal law enforcement and military forces, the president would have the opportunity to impose their will on an existential catastrophe, and if history is a guide, provide the country with its best chance to respond to this nation's first existential catastrophe.

APPENDIX A. MISSION ASSIGNMENTS

MAs issued under the authority of the Stafford Act are the way in which federal agencies are asked to take actions to respond to a catastrophic disaster, and which also function to provide the fiscal mechanism to reimburse those agencies for the work they performed. Current FEMA practice, which stretches back to at least the beginning of the formation of FEMA, is to “ask not task” other federal agencies. In other words, if another federal agency declines a MA, it either looks for another federal agency to perform the work or must seek resolution through some kind of higher decision making body in the federal government.

The statutory definition of a MA is “a work order issued to a Federal agency by the Agency [FEMA], directing completion by that agency of a specified task and setting forth funding, other managerial controls, and guidance.”³³³ The current FEMA Standard Operating Procedure (SOP) describes the use of MAs to meet the following circumstances:

Mission assignments are issued by FEMA under the authority of the Stafford Act to meet urgent, immediate, or short-term needs of states or local governments unable to provide the resources needed to save lives, protect property, or preserve public health or public safety during a major disaster or emergency, or to avert the threat of a major disaster or emergency.³³⁴

³³³ 6 U.S.C. § 741(4). This definition supports the direction to FEMA to create PrePSMAs under the Federal Preparedness for the National Preparedness System at 6 U.S.C. § 753(c) To expedite the provision of assistance under the NRP, the President shall ensure that the Administrator, in coordination with federal agencies with responsibilities under the NRP, develops prescribed mission assignments, including logistics, communications, mass care, health services, and public safety. See also 44 CFR 206.2(18) “Mission assignment: Work order issued to a Federal agency by the Regional Administrator, Assistant Administrator for the Disaster Operations Directorate, or Administrator, directing completion by that agency of a specified task and citing funding, other managerial controls, and guidance.” It does not appear that Congress is inclined to substitute “setting forth” for “citing.” Reference may be made to the definitions of “citing” and “forth” elsewhere although the author referred to the online Merriam-Webster Dictionary for guidance.

³³⁴ *FEMA Mission Assignment Program Standard Operating Procedures*, ver. 3, May 2011, Appendix B: Definitions, 43.

FEMA currently divides MAs into three categories: Direct Federal Assistance (DFA), Technical Assistance (TA),³³⁵ and Federal Operational Support (FOS).

Chapter 2–1 of the FEMA Mission Assignment Program Standard Operating Procedures states the following about DFA, TA, and FOS.

- I. Federal Operational Support (FOS): Issued by FEMA directing another Federal agency to provide direct technical, operational, or logistical support to FEMA or another Federal agency in anticipation of or in response to a Presidential declaration of a major disaster or emergency.
 - Requested by the Federal Government
 - 100% Federally funded
 - Eligible before or after a declaration
 - *Example: A mission assignment issued to activate the United States Forest Service (USFS) to the NRCC to perform duties of ESF #4 in support of disaster operations.*
- II. Technical Assistance (TA): Issued by FEMA in response to a state approved request to direct a Federal agency to provide only technical expertise to state or local government when the state has the resources, but lacks the knowledge or skills needed to perform the work related to the disaster or emergency.
 - Must be requested by the State
 - 100% Federally funded
 - Eligible after a declaration
 - *Example: A mission assignment issued to the United States Army Corps of Engineers (USACE) to provide assistance to affected counties in the writing of debris contracts.*
- III. Direct Federal Assistance (DFA): Issued by FEMA in response to a state approved request to direct a Federal agency to provide goods and services to state or local government when the affected jurisdiction lacks the capability to perform or to contract for eligible work during a declared major disaster or emergency.

³³⁵ TA will likely be eliminated as a category of MAs by FEMA in 2013.

- Must be requested by the State
- Subject to a cost share—normally 75% Federal share, 25% State share
- The State may request the President to amend the cost share of federal obligations in extreme situations.
- Eligible after a declaration
- *Example: A mission assignment issued to the Department of Health and Human Services (HHS) to establish temporary medical facilities for disaster victims within the affected disaster area.³³⁶*

FOS was created around 1994 by the FEMA response staff that needed to issue MAs to other federal agencies before such assistance was requested by a state,³³⁷ which was probably a direct result of the hearings and reports on Hurricane Andrew. These hearings and reports found federal agencies were willing to prepare to deploy assets before a Stafford Act declaration but were unwilling to do so until FEMA issued a MA. FOS MA's allow FEMA to issue a MA to another federal agency without a declaration but cannot be used to provide actual disaster assistance.

DFA and TA predate the creation of FOS.

(a) IN GENERAL—Notwithstanding any other provision of law, including any agreement, the Federal share of assistance, including any direct Federal assistance, provided for the States of Louisiana, Mississippi, Florida, Alabama, and Texas in connection with Hurricanes Katrina, Wilma, Dennis, and Rita under sections 403, 406, 407, and 408 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170b, 5172, 5173, and 5174) shall be 100 percent of the eligible costs under such sections.

(b) APPLICABILITY—

(1) IN GENERAL—The Federal share provided by subsection (a) shall apply to disaster assistance applied for before the date of enactment of this Act.

³³⁶ FEMA Mission Assignment Program Standard Operating Procedures, Chapter 2–1.

³³⁷ Former FEMA MA program manager, in discussion with the author, July 2011.

(2) LIMITATION—In the case of disaster assistance provided under sections 403, 406, and 407 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, the Federal share provided by subsection (a) shall be limited to assistance provided for projects for which a “request for public assistance form” has been submitted.³³⁸

It can be inferred from this provision that Congress has acknowledged the statutory authority for DFA stems from the above ascribed sections of the Stafford Act along with Section 502. See also FEMA Recovery Policy 9523.9 100% Funding for Direct Federal Assistance and Grant Assistance, which refers to Sections 403 and 407 of the Stafford Act for authority.

DFA is described in FEMA regulations and consists of “emergency work” or debris removal under Sections 403, 407 and 502(5) of the Stafford Act.

When the State and local government lack the capability to perform or to contract for eligible emergency work and/or debris removal, under sections 402(1) and (4), 403, 407, 502(a)(1), (5) and (7) of the Act, the Grantee may request that the work be accomplished by a Federal agency. Such assistance is subject to the cost sharing provisions outlined in § 206.203(b) of this subpart. Direct Federal assistance is also subject to the eligibility criteria contained in Subpart H of these regulations. FEMA will reimburse other Federal agencies in accordance with Subpart A of these regulations.³³⁹

By naming particular subsections of Sections 402 and 502 that do not include debris removal, it appears that these sections of the Stafford Act are considered the complete statutory authority for all DFA including both emergency work and debris removal. However, while it names particular parts of Sections 402 and 502, and specifically, does not include those parts referring to “technical and advisory assistance” in Section 402(3) and Section 502(3), it does cite all of Section 403 as the authority for DFA. This view is problematic if “technical advice” under Section 403(a)(3)(H) is the

³³⁸ DFA does not appear in U.S. Code in the context of federal disaster assistance except for a provision of the *U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007*, Public Law 110–28, 121 Stat. 112 (2007), Sec. 4501.

³³⁹ 44 C.F.R. 208(a) Direct Federal Assistance.

same as “technical and advisory assistance” under Sections 402 and 502, and FEMA sought to include all types of TA in a separate category. However, TA is not specifically defined in FEMA regulations or statute.

DFA is also subject to the eligibility requirements of FEMA’s Public Assistance program.³⁴⁰ FEMA regulations define emergency work as “emergency protective measures to save lives, to protect public health and safety, and to protect improved property.”

Emergency protective measures to save lives, to protect public health and safety, and to protect improved property are eligible. See also *id.* at 206.225(a)(3). In order to be eligible, emergency protective measures must:(i) Eliminate or lessen immediate threats to live, public health or safety; or (ii) Eliminate or lessen immediate threats of significant additional damage to improved public or private property through measures which are cost effective.³⁴¹

³⁴⁰ 44 C.F.R. 208(a) Direct Federal Assistance.

³⁴¹ 44 C.F.R. 206.225(a) (1).

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APPENDIX B. DISASTER RELIEF ACT OF 1950 PUB. L. NO. 81-975

[DISASTER RELIEF ACT OF 1950]

64 STAT.] 81ST CONG., 2D SESS.—CHS. 1124, 1125—SEPT. 30, 1950

1109

the United States, or under the supervision of, or pursuant to a contract or other arrangement with, the Bureau of Indian Affairs.

(3) The term "parent" includes a legal guardian or other person standing in loco parentis.

(4) The term "free public education" means education which is provided at public expense, under public supervision and direction, and without tuition charge, and which is provided as elementary or secondary school education in the applicable State.

(5) The term "current expenditures" means expenditures for free public education to the extent that such expenditures are made from current revenues, except that such term does not include any such expenditure for the acquisition of land, the erection of facilities, interest, or debt service.

(6) The term "local educational agency" means a board of education or other legally constituted local school authority having administrative control and direction of free public education in a county, township, independent, or other school district located within a State. Such term includes any State agency which directly operates and maintains facilities for providing free public education.

(7) The term "State educational agency" means the officer or agency primarily responsible for the State supervision of public elementary and secondary schools.

(8) The term "State" means a State, Alaska, Hawaii, Puerto Rico, or the Virgin Islands.

(9) The terms "Commissioner of Education" and "Commissioner" means the United States Commissioner of Education.

(10) Average daily attendance shall be determined in accordance with State law; except that, notwithstanding any other provision of this Act, where the local educational agency of the school district in which any child resides makes or contracts to make a tuition payment for the free public education of such child in a school situated in another school district, for purposes of this Act the attendance of such child at such school shall be held and considered (A) to be attendance at a school of the local educational agency so making or contracting to make such tuition payment, and (B) not to be attendance at a school of the local educational agency receiving such tuition payment or entitled to receive such tuition payment under the contract.

Approved September 30, 1950.

[CHAPTER 1125]

AN ACT

To authorize Federal assistance to States and local governments in major disasters, and for other purposes.

September 30, 1950
[H. R. 8366]
(Public Law 875)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the intent of Congress to provide an orderly and continuing means of assistance by the Federal Government to States and local governments in carrying out their responsibilities to alleviate suffering and damage resulting from major disasters, to repair essential public facilities in major disasters, and to foster the development of such State and local organizations and plans to cope with major disasters as may be necessary.

SEC. 2. As used in this Act, the following terms shall be construed as follows unless a contrary intent appears from the context:

(a) "Major disaster" means any flood, drought, fire, hurricane, earthquake, storm, or other catastrophe in any part of the United States which, in the determination of the President, is or threatens to be of sufficient severity and magnitude to warrant disaster assistance by the Federal Government to supplement the efforts and available resources of States and local governments in alleviating the

Disasters.
Federal aid.

Definitions.

damage, hardship, or suffering caused thereby, and respecting which the governor of any State (or the Board of Commissioners of the District of Columbia) in which such catastrophe may occur or threaten certifies the need for disaster assistance under this Act, and shall give assurance of expenditure of a reasonable amount of the funds of the government of such State, local governments therein, or other agencies, for the same or similar purposes with respect to such catastrophe;

(b) "United States" includes the District of Columbia, Alaska, Hawaii, Puerto Rico, and the Virgin Islands;

(c) "State" means any State in the United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands;

(d) "Governor" means the chief executive of any State;

(e) "Local government" means any county, city, village, town, district, or other political subdivision of any State, or the District of Columbia;

(f) "Federal agency" means any department, independent establishment, Government corporation, or other agency of the executive branch of the Federal Government, excepting, however, the American National Red Cross.

Assistance authorized.

SEC. 3. In any major disaster, Federal agencies are hereby authorized when directed by the President to provide assistance (a) by utilizing or lending, with or without compensation therefor, to States and local governments their equipment, supplies, facilities, personnel, and other resources, other than the extension of credit under the authority of any Act; (b) by distributing, through the American National Red Cross or otherwise, medicine, food, and other consumable supplies; (c) by donating to States and local governments equipment and supplies determined under then existing law to be surplus to the needs and responsibilities of the Federal Government; and (d) by performing on public or private lands protective and other work essential for the preservation of life and property, clearing debris and wreckage, making emergency repairs to and temporary replacements of public facilities of local governments damaged or destroyed in such major disaster, and making contributions to States and local governments for purposes stated in subsection (d). The authority conferred by this Act, and any funds provided hereunder shall be supplementary to, and not in substitution for, nor in limitation of, any other authority conferred or funds provided under any other law. Any funds received by Federal agencies as reimbursement for services or supplies furnished under the authority of this section shall be deposited to the credit of the appropriation or appropriations currently available for such services or supplies. The Federal Government shall not be liable for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government in carrying out the provisions of this section.

Nonliability for claims.

SEC. 4. In providing such assistance hereunder, Federal agencies shall cooperate to the fullest extent possible with each other and with States and local governments, relief agencies, and the American National Red Cross, but nothing contained in this Act shall be construed to limit or in any way affect the responsibilities of the American National Red Cross under the Act approved January 5, 1905 (33 Stat. 599), as amended.

Cooperation of Federal agencies.

*36 U. S. C. §§ 1-6,
8, 9; Sup. III, § 1 et seq.*

SEC. 5. (a) In the interest of providing maximum mobilization of Federal assistance under this Act, the President is authorized to coordinate in such manner as he may determine the activities of Federal agencies in providing disaster assistance. The President may direct any Federal agency to utilize its available personnel, equipment, supplies, facilities, and other resources, in accordance with the authority herein contained.

(b) The President may, from time to time, prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this Act, and he may exercise any power or authority conferred on him by any section of this Act either directly or through such Federal agency as he may designate.

Rules and regulations.

SEC. 6. If facilities owned by the United States are damaged or destroyed in any major disaster and the Federal agency having jurisdiction thereof lacks the authority or an appropriation to repair, reconstruct, or restore such facilities, such Federal agency is hereby authorized to repair, reconstruct, or restore such facilities to the extent necessary to place them in a reasonably usable condition and to use therefor any available funds not otherwise immediately required: *Provided, however,* That the President shall first determine that the repair, reconstruction, or restoration is of such importance and urgency that it cannot reasonably be deferred pending the enactment of specific authorizing legislation or the making of an appropriation therefor. If sufficient funds are not available to such Federal agency for use in repairing, reconstructing, or restoring such facilities as above provided, the President is authorized to transfer to such Federal agency funds made available under this Act in such amount as he may determine to be warranted in the circumstances. If said funds are insufficient for this purpose, there is hereby authorized to be appropriated to any Federal agency repairing, reconstructing, or restoring facilities under authority of this section such sum or sums as may be necessary to reimburse appropriated funds to the amount expended therefrom.

Repair, etc. of U. S. facilities.

SEC. 7. In carrying out the purposes of this Act, any Federal agency is authorized to accept and utilize with the consent of any State or local government, the services and facilities of such State or local government, or of any agencies, officers, or employees thereof. Any Federal agency, in performing any activities under section 3 of this Act, is authorized to employ temporarily additional personnel without regard to the civil-service laws and the Classification Act of 1923, as amended, and to incur obligations on behalf of the United States by contract or otherwise for the acquisition, rental, or hire of equipment, services, materials, and supplies for shipping, drayage, travel and communication, and for the supervision and administration of such activities. Such obligations, including obligations arising out of the temporary employment of additional personnel, may be incurred by any agency in such amount as may be made available to it by the President out of the funds specified in section 8. The President may, also, out of such funds, reimburse any Federal agency for any of its expenditures under section 3 in connection with a major disaster, such reimbursement to be in such amounts as the President may deem appropriate.

Local services and facilities.

SEC. 8. There is hereby authorized to be appropriated to the President a sum or sums, not exceeding \$5,000,000 in the aggregate, to carry out the purposes of this Act. The President shall transmit to the Congress at the beginning of each regular session a full report covering the expenditure of the amounts so appropriated with the amounts of the allocations to each State under this Act. The President may from time to time transmit to the Congress supplemental reports in his discretion, all of which reports shall be referred to the Committees on Appropriations and the Committees on Public Works of the Senate and the House of Representatives.

Additional personnel.

63 Stat. 972, 954.
42 U. S. C., Sup. III,
H 1071-1153.
Ante, pp. 232, 262;
post, p. 1100.

SEC. 9. The Act of July 25, 1947 (Public Law 233, Eightieth Congress), entitled "An Act to make surplus property available for the alleviation of damage caused by flood or other catastrophe", is hereby repealed.

Appropriation authorized.

Report to Congress.

61 Stat. 422.
42 U. S. C., Sup. III,
H 1862-1864.

Approved September 30, 1950.

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APPENDIX C. DISASTER RELIEF ACT OF 1970 PUB. L. NO. 91-606

[DISASTER RELIEF ACT OF 1970]

1744

PUBLIC LAW 91-606—DEC. 31, 1970

[84 STAT.

79 Stat. 137.
26 USC 4061.

70 Stat. 388;
80 Stat. 331.

75 Stat. 123.

Ante, p. 245.

75 Stat. 127.

- (4) Section 4061(b)(1) (relating to imposition of tax on parts and accessories).
(5) Section 4071(d) (relating to imposition of tax on tires and tubes).
(6) Section 4081(b) (relating to imposition of tax on gasoline).
(7) Section 4481(a) (relating to imposition of tax on use of highway motor vehicles).
(8) Section 4481(e) (relating to period tax in effect).
(9) Section 4482(c)(4) (defining taxable period).
(10) Section 6156(e)(2) (relating to installment payments of tax on use of highway motor vehicles).
(11) Section 6421(h) (relating to tax on gasoline used for certain nonhighway purposes or by local transit systems).
(b) Section 6412(a)(2) of such Code (relating to floor stock refunds) is amended—
(1) by striking out “1972” each place it appears and inserting in lieu thereof “1977”;
(2) by striking out “January 1, 1973” each place it appears and inserting in lieu thereof “January 1, 1978”; and
(3) by striking out “February 10, 1973” each place it appears and inserting in lieu thereof “March 31, 1978”.

Approved December 31, 1970.

Public Law 91-606

AN ACT

December 31, 1970
[S. 3619]

To revise and expand Federal programs for relief from the effects of major disasters, and for other purposes.

Disaster Relief
Act of 1970.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the “Disaster Relief Act of 1970”.

TITLE I—FINDINGS AND DECLARATIONS; DEFINITIONS

FINDINGS AND DECLARATIONS

SEC. 101. (a) The Congress hereby finds and declares that—

(1) because loss of life, human suffering, loss of income, and property loss and damage result from major disasters such as hurricanes, tornadoes, storms, floods, high waters, wind-driven

waters, tidal waves, earthquakes, droughts, fires, and other catastrophes; and

(2) because such disasters disrupt the normal functioning of government and the community, and adversely affect individual persons and families with great severity;

special measures, designed to assist the efforts of the affected States in expediting the rendering of aid, assistance, and emergency welfare services, and the reconstruction and rehabilitation of devastated areas, are necessary.

(b) It is the intent of the Congress, by this Act, to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters by—

(1) revising and broadening the scope of existing major disaster relief programs;

(2) encouraging the development of comprehensive disaster relief plans, programs, and organizations by the States; and

(3) achieving greater coordination and responsiveness of Federal major disaster relief programs.

DEFINITIONS

SEC. 102. As used in this Act—

(1) “major disaster” means any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, drought, fire, or other catastrophe in any part of the United States, which, in the determination of the President, is or threatens to be of sufficient severity and magnitude to warrant disaster assistance by the Federal Government to supplement the efforts and available resources of States, local governments, and relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby, and with respect to which the Governor of any State in which such catastrophe occurs or threatens to occur certifies the need for Federal disaster assistance under this Act and gives assurance of the expenditure of a reasonable amount of the funds of such State, its local governments, or other agencies for alleviating the damage, loss, hardship or suffering resulting from such catastrophe;

(2) “United States” means the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands;

(3) "State" means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Trust Territory of the Pacific Islands;

(4) "Governor" means the chief executive of any State;

(5) "local government" means any county, city, village, town, district, or other political subdivision of any State, and includes any rural community or unincorporated town or village for which an application for assistance is made by a State or political subdivision thereof;

(6) "Federal agency" means any department, independent establishment, Government corporation, or other agency of the executive branch of the Federal Government, except the American National Red Cross; and

(7) "Director" means the Director of the Office of Emergency Preparedness.

TITLE II—THE ADMINISTRATION OF DISASTER ASSISTANCE

FEDERAL COORDINATING OFFICER

Appointment.

SEC. 201. (a) Immediately upon his designation of a major disaster area, the President shall appoint a Federal coordinating officer to operate under the Office of Emergency Preparedness in such area.

Duties.

(b) In order to effectuate the purposes of this Act, the coordinating officer, within the designated area, shall

(1) make an initial appraisal of the types of relief most urgently needed;

(2) establish such field offices as he deems necessary and as are authorized by the Director;

(3) coordinate the administration of relief, including activities of the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief or disaster assistance organizations which agree to operate under his advice or direction, except that nothing contained in this Act shall limit or in any way affect the responsibilities of the American National Red Cross under the Act of January 5, 1905, as amended (33 Stat. 599); and

(4) take such other action, consistent with authority delegated to him by the Director, and consistent with the provisions of this Act, as he may deem necessary to assist local citizens and public officials in promptly obtaining assistance to which they are entitled.

EMERGENCY SUPPORT TEAMS

61 Stat. 80.
36 USC 1.

SEC. 202. The Director is authorized to form emergency support teams of Federal personnel to be deployed in a major disaster area. Such emergency support teams shall assist the Federal coordinating officer in carrying out his responsibilities pursuant to section 201(b) of this Act. Upon request of the Director, the head of any Federal department or agency is authorized to detail to temporary duty with the emergency support teams on either a reimbursable or nonreimbursable basis, as is determined necessary by the discretion of the Director, such personnel within the administrative jurisdiction of the head of the Federal department or agency as the Director may need or believe to be useful for carrying out the functions of the emergency support teams, each such detail to be without loss of seniority, pay, or other employee status.

**COOPERATION OF FEDERAL AGENCIES IN RENDERING
EMERGENCY ASSISTANCE**

SEC. 203. (a) In any major disaster, Federal agencies are hereby authorized, on direction of the President, to provide assistance by—

(1) utilizing or lending, with or without compensation therefor, to States and local governments, their equipment, supplies, facilities, personnel, and other resources, other than the extension of credit under the authority of any Act;

(2) distributing or rendering, through the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief and disaster assistance organizations, or otherwise, medicine, food, and other consumable supplies, or emergency assistance;

(3) donating or lending equipment and supplies determined in accordance with applicable laws to be surplus to the needs and responsibilities of the Federal Government to State and local governments for use or distribution by them for the purposes of this Act; and

(4) performing on public or private lands or waters any emergency work essential for the protection and preservation of life and property, including—

(A) clearing and removing debris and wreckage in accordance with section 224;

(B) making repairs to, restoring to service, or replacing public facilities (including street, road, and highway facilities) of State and local governments damaged or destroyed by a major disaster, except that the Federal contributions therefor shall not exceed the net cost of restoring each such facility on the basis of the design of such facility as it existed immediately prior to the disaster in conformity with current codes, specifications, and standards;

(C) providing emergency shelter for individuals and families who, as a result of a major disaster, require such assistance; and

(D) making contributions to State or local governments for the purpose of carrying out the provisions of paragraph (4).

(b) Emergency work performed under subsection (a)(4) of this section shall not preclude Federal assistance under any other section of this Act.

(c) Federal agencies may be reimbursed for expenditures under this Act from funds appropriated for the purposes of this Act. Any funds received by Federal agencies as reimbursement for services or supplies furnished under the authority of this section shall be deposited to the credit of the appropriation or appropriations currently available for such services or supplies.

(d) The Federal Government shall not be liable for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this section.

(e) In carrying out the purposes of this Act, any Federal agency is authorized to accept and utilize the services or facilities of any State or local government, or of any agency, office, or employee thereof, with the consent of such government. Any Federal agency, in performing any activities under this section, is authorized to appoint and fix the compensation of such temporary personnel as may be necessary, with-

Reimbursement.

Liability.

**State facilities
and personnel, use.**

80 Stat. 443.
5 USC 5101.
Ante, p. 198-1.

5 USC 3109.

Presidential
powers.

Regulations.

Program review.

Study.

Report to Con-
gress.

Waiver.

out regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to the provisions of chapter 51 and subchapter III of such title relating to classification and General Schedule pay rates, to employ experts and consultants in accordance with the provisions of section 3109 of such title, and to incur obligations on behalf of the United States by contract or otherwise for the acquisition, rental, or hire of equipment, services, materials, and supplies for shipping, drayage, travel, and communication, and for the supervision and administration of such activities. Such obligations, including obligations arising out of the temporary employment of additional personnel, may be incurred by an agency in such amount as may be made available to it by the President.

(f) In the interest of providing maximum mobilization of Federal assistance under this Act, the President is authorized to coordinate in such manner as he may determine the activities of Federal agencies in providing disaster assistance. The President may direct any Federal agency, with or without reimbursement, to utilize its available personnel, equipment, supplies, facilities, and other resources in accordance with the authority, herein contained. The President may prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this Act, and he may exercise any power or authority conferred on him by any section of this Act either directly or through such Federal agency as he may designate.

(g) The President, acting through the Office of Emergency Preparedness, shall conduct periodic reviews (at least annually) of the activities of Federal and State departments or agencies providing disaster assistance, in order to assure maximum coordination of such programs, and to evaluate progress being made in the development of Federal, State, and local preparedness to cope with major disasters.

(h) The Director of the Office of Emergency Preparedness is authorized and directed to make in cooperation with the heads of other affected Federal and State agencies, a full and complete investigation and study for the purpose of determining what additional or improved plans, procedures, and facilities are necessary to provide immediate effective action to prevent or minimize losses of publicly or privately owned property and personal injuries or deaths which could result from fires (forest and grass), earthquakes, tornadoes, freezes and frosts, tsunami, storm surges and tides, and floods, which are or threaten to become major disasters. Not later than one year after the date of enactment of this subsection, and from time to time, the Director of the Office of Emergency Preparedness shall report to Congress the findings of this study and investigation together with his recommendations with respect thereto.

USE OF LOCAL FIRMS AND INDIVIDUALS

SEC. 204. In the expenditure of Federal funds for debris clearance, distribution of supplies, reconstruction, and other major disaster assistance activities which may be carried out by contract with private organizations, firms, or individuals, preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals who reside or do business primarily in the disaster area.

FEDERAL GRANT-IN-AID PROGRAMS

SEC. 205. Any Federal agency charged with the administration of a Federal grant-in-aid program is authorized, if so requested by the applicant State or local authorities, to modify or waive, for the dura-

tion of a major disaster proclamation, such administrative procedural conditions for assistance as would otherwise prevent the giving of assistance under such programs if the inability to meet such conditions is a result of the disaster.

STATE DISASTER PLANS

SEC. 206. (a) The President is authorized to provide assistance to the States in developing comprehensive plans and practicable programs for preparation against major disasters, and for relief and assistance for individuals, businesses, and local governments following such disasters. Such plans should include long-range recovery and reconstruction assistance plans for seriously damaged or destroyed public and private facilities.

Grants, limitation.

(b) The President is authorized to make grants of not more than \$250,000 to any State, upon application therefor, for not to exceed 50 per centum of the cost of developing such plans and programs.

State agency, designation.

(c) Any State desiring assistance under this section shall designate or create an agency which is specially qualified to plan and administer such a disaster relief program, and shall, through such agency, submit a State plan to the President, which shall—

(1) set forth a comprehensive and detailed State program for preparation against, and relief following, a major disaster, including provisions for emergency and long-term assistance to individuals, businesses, and local governments; and

State coordinating officer.

(2) include provision for the appointment of a State coordinating officer to act in cooperation with the Federal coordinating officer appointed under section 201 of this Act.

Report to President; submission to Congress.

(d) From time to time the Director shall make a report to the President, for submission to the Congress, containing his recommendations for programs for the Federal role in the implementation and funding of comprehensive disaster relief plans, and such other recommendations relating to the Federal role in disaster relief activities as he deems warranted.

Maintenance grants, limitation.

(e) The President is authorized to make grants not to exceed 50 per centum of the cost of improving, maintaining, and updating State disaster assistance plans, except that no such grant shall exceed \$25,000 per annum to any State.

USE AND COORDINATION OF RELIEF ORGANIZATIONS

SEC. 207. (a) In providing relief and assistance following a major disaster, the Director may utilize, with their consent, the personnel and facilities of the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief or disaster assistance organizations, in the distribution of medicine, food, supplies, or other items, and in the restoration, rehabilitation, or reconstruction of community services and essential facilities whenever the Director finds that such utilization is necessary.

(b) The Director is authorized to enter into agreements with the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief or disaster assistance organizations under which the disaster relief activities of such organizations may be coordinated by the Federal coordinating officer whenever such organizations are engaged in providing relief during and after a major disaster. Any such agreement shall include provisions conditioning use of the facilities of the Office of Emergency Preparedness and the

services of the coordinating officer upon compliance with regulations promulgated by the Director under sections 208 and 209 of this Act, and such other regulations as the Director may require.

DUPLICATION OF BENEFITS

SEC. 208. (a) The Director, in consultation with the head of each Federal agency administering any program providing financial assistance to persons, business concerns, or other entities suffering losses as the result of a major disaster, shall assure that no such person, business concern, or other entity will receive such assistance with respect to any part of such loss as to which he has received financial assistance under any other program.

(b) The Director shall assure that no person, business concern, or other entity receives any Federal assistance for any part of a loss suffered as the result of a major disaster if such person, concern, or entity received compensation from insurance or any other source for that part of such a loss. Partial compensation for a loss or a part of a loss resulting from a major disaster shall not preclude additional Federal assistance for any part of such a loss not compensated otherwise.

(c) Whenever the Director determines (1) that a person, business concern, or other entity has received assistance under this Act for a loss and that such person, business concern or other entity received assistance for the same loss from another source, and (2) that the amount received from all sources exceeded the amount of the loss, he shall direct such person, business concern, or other entity to pay to the Treasury an amount, not to exceed the amount of Federal assistance received, sufficient to reimburse the Federal Government for that part of the assistance which he deems excessive.

NONDISCRIMINATION IN DISASTER ASSISTANCE

Regulations.

SEC. 209. (a) The Director shall issue, and may alter and amend, such regulations as may be necessary for the guidance of personnel carrying out emergency relief functions at the site of a major disaster. Such regulations shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status prior to a major disaster.

(b) As a condition of participation in the distribution of assistance or supplies under section 207, relief organizations shall be required to comply with regulations relating to nondiscrimination promulgated by the Director, and such other regulations applicable to activities within a major disaster area as he deems necessary for the effective coordination of relief efforts.

DISASTER WARNINGS

SEC. 210. The President is authorized to utilize or to make available to Federal, State, and local agencies the facilities of the civil defense communications system established and maintained pursuant to section 201(c) of the Federal Civil Defense Act of 1950, as amended (50 U.S.C. app. 2281(c)), for the purpose of providing needed warning to governmental authorities and the civilian population in areas endangered by imminent major disasters.

PREDISASTER ASSISTANCE

SEC. 221. If the President determines that a major disaster is imminent, he is authorized to use Federal departments, agencies, and instrumentalities, and all other resources of the Federal Government to avert or lessen the effects of such disaster before its actual occurrence.

EMERGENCY COMMUNICATIONS

SEC. 222. The Director is authorized during, or in anticipation of, an emergency to establish temporary communications in any major disaster area in order to carry out the functions of his office, and to make such communications available to State and local government officials and other persons as he deems appropriate.

EMERGENCY PUBLIC TRANSPORTATION

SEC. 223. The Director is authorized to provide temporary public transportation service to meet emergency needs in a major disaster area. Such service will provide transportation to governmental offices, supply centers, stores, post offices, schools, major employment centers, and such other places as may be necessary in order to enable the community to resume its normal pattern of life as soon as possible.

DEBRIS REMOVAL

SEC. 224. (a) The President, whenever he determines it to be in the public interest, is authorized—

- (1) through the use of Federal departments, agencies, and instrumentalities, to clear debris and wreckage resulting from a major disaster from publicly and privately owned lands and waters.
- (2) to make grants to any State or local government for the purpose of removing debris or wreckage resulting from a major disaster from publicly or privately owned lands and waters.

Grants.

(b) No authority under this section shall be exercised unless the affected State or local government shall first arrange an unconditional authorization for removal of such debris or wreckage from public and private property, and, in the case of removal of debris or wreckage from private property, shall first agree to indemnify the Federal Government against any claim arising from such removal.

Indemnity provision.

FIRE SUPPRESSION GRANTS

SEC. 225. The President is authorized to provide assistance, including grants, to any State for the suppression of any fire on publicly or privately owned forest or grassland which threatens such destruction as would constitute a major disaster.

TEMPORARY HOUSING ASSISTANCE

SEC. 226. (a) The Director is authorized to provide temporary housing or other emergency shelter, including, but not limited to, mobile homes or other readily fabricated dwellings for those who, as a result of such major disaster, require temporary housing or other emergency shelter, except that for the first twelve months of occupancy no rentals shall be established for any such accommodations, thereafter rentals shall be established, based upon fair market value

of the accommodations being furnished, adjusted to take into consideration the financial ability of the occupant. Notwithstanding any other provision of law, any such emergency housing acquired by purchase may be sold directly to individuals and families who are occupants thereof at prices that are fair and equitable. Any mobile home or readily fabricated dwelling shall be placed on a site complete with utilities provided by State or local government, or by the owner or occupant of the site who was displaced by the major disaster, without charge to the United States. However, the Director may elect to provide other more economical and accessible sites at Federal expense when he determines such action to be in the public interest.

Temporary mortgage or rent payments.

(b) The President is authorized to provide assistance on a temporary basis in the form of mortgage or rental payments to or on behalf of individuals and families who, as a result of financial hardship caused by a major disaster, have received written notice of dispossess or eviction from a residence by reason of foreclosure of any mortgage or lien, cancellation of any contract of sale, or termination of any lease, entered into prior to the disaster. Such assistance shall be provided for a period of not to exceed one year or for the duration of the period of financial hardship, whichever is the lesser. The President is authorized for the purposes of this subsection and in furtherance of the purposes of section 240 of this Act, to provide reemployment assistance services under other laws to individuals who are unemployed as a result of a major disaster.

Reemployment assistance.

SMALL BUSINESS DISASTER LOANS

Sec. 231. In the administration of the disaster loan program under section 7(b) (1), (2), and (4) of the Small Business Act, as amended (15 U.S.C. 636(b)), in the case of property loss or damage or injury resulting from a major disaster as determined by the President or a disaster as determined by the Administrator, the Small Business Administration—

72 Stat. 389;
78 Stat. 7.

(1) to the extent such loss or damage or injury is not compensated for by insurance or otherwise, (A) shall, on that part of any loan in excess of \$500, cancel the principal of the loan, except that the total amount so canceled shall not exceed \$2,500, except that this clause (A) shall apply only to loans made to cover losses and damage and injury resulting from major disasters as determined by the President, and (B) may defer interest payments or principal payments, or both, in whole or in part, on any loan made under this section during the first three years of the term of the loan except that any such deferred payments shall bear interest at the rate determined under section 234 of this Act.

(2) to the extent such injury, loss, or damage is not compensated for by insurance or otherwise, may grant any loan for repair, rehabilitation, or replacement of property damaged, or destroyed, without regard to whether the required financial assistance is otherwise available from private sources.

(3) may, in the case of the total destruction or substantial property damage of a home or business concern, refinance any mortgage or other liens outstanding against the destroyed or damaged property if such property is to be repaired, rehabilitated, or replaced, except that the amount refinanced shall not exceed the amount of the physical loss sustained. Any such refinancing shall be subject to the provisions of clauses (1) and (2) of this section.

FARMERS HOME ADMINISTRATION EMERGENCY LOANS

SEC. 232. In the administration of the emergency loan program under subtitle C of the Consolidated Farmers Home Administration Act of 1961, as amended (7 U.S.C. 1961–1967), and the rural housing loan program under section 502 of title V of the Housing Act of 1949, as amended (42 U.S.C. 1472), in the case of loss or damage, resulting from a major disaster as determined by the President, or a natural disaster as determined by the Secretary of Agriculture—

75 Stat. 311.

63 Stat. 433;
79 Stat. 497.

(1) to the extent such loss or damage is not compensated for by insurance or otherwise, (A) shall, on that part of any loan in excess of \$500, cancel the principal of the loan, except that the total amount so canceled shall not exceed \$2,500, except that this clause (A) shall apply only to loans made to cover losses and damage resulting from major disasters as determined by the President, and (B) may defer interest payments or principal payments, or both, in whole or in part, on any loan made under this section during the first three years of the term of the loan, except that any such deferred payments shall bear interest at the rate determined under section 234 of this Act.

(2) to the extent such injury, loss, or damage is not compensated for by insurance or otherwise, may grant any loan for repair, rehabilitation, or replacement of property damaged or destroyed, without regard to whether the required financial assistance is otherwise available from private sources.

Limitation.

(3) may, in the case of the total destruction or substantial property damage of homes or farm service buildings and related structures and equipment, refinance any mortgage or other liens outstanding against the destroyed or damaged property if such property is to be repaired, rehabilitated, or replaced, except that the amount refinanced shall not exceed the amount of the physical loss sustained. Any such refinancing shall be subject to the provisions of clauses (1) and (2) of this section.

LOANS HELD BY THE VETERANS' ADMINISTRATION

SEC. 233. (1) Section 1820(a)(2) of title 38, United States Code, is amended to read as follows:

72 Stat. 1213.

“(2) subject to specific limitations in this chapter, consent to the modification, with respect to rate of interest, time of payment of principal or interest or any portion thereof, security or other provisions of any note, contract, mortgage or other instrument securing a loan which has been guaranteed, insured, made or acquired under this chapter;”

(2) Section 1820(f) of title 38, United States Code, is amended to read as follows:

80 Stat. 1316.

“(f) Whenever loss, destruction, or damage to any residential property securing loans guaranteed, insured, made, or acquired by the Administrator under this chapter occurs as the result of a major disaster as determined by the President under the Disaster Assistance Act of 1970, the Administrator shall (1) provide counseling and such other service to the owner of such property as may be feasible and shall inform such owner concerning the disaster assistance available from other Federal agencies and from State or local agencies, and (2) pursuant to subsection (a)(2) of this section, extend on an individual case basis such forbearance or indulgence to such owner as the Administrator determines to be warranted by the facts of the case and the circumstances of such owner.”

DISASTER LOAN INTEREST RATES

SEC. 234. Any loan made under sections 231, and 232 of this Act shall not exceed the current cost of repairing or replacing the disaster injury, loss, or damage in conformity with current codes and specifications. Any loan made under sections 231, 232, 236(b) and 237 of this Act shall bear interest at a rate determined by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity of ten to twelve years reduced by not to exceed 2 percentum per annum. In no event shall any loan made under this section bear interest at a rate in excess of 6 per centum per annum.

Maximum rate.

AGE OF APPLICANT FOR LOANS

SEC. 235. In the administration of any Federal disaster loan program under the authority of section 231, 232, or 233 of this Act, the age of any adult loan applicant shall not be considered in determining whether such loan should be made or the amount of such loan.

FEDERAL LOAN ADJUSTMENTS

49 Stat. 1366.
7 USC 912.

SEC. 236. (a) In addition to the loan extension authority provided in section 12 of the Rural Electrification Act, the Secretary of Agriculture is authorized to adjust and readjust the schedules for payment of principal and interest on loans to borrowers under programs administered by the Rural Electrification Administration, and to extend the maturity date of any such loan to a date not beyond forty years from the date of such loan where he determines such action is necessary because of the impairment of the economic feasibility of the system, or the loss, destruction, or damage of the property of such borrowers as a result of a major disaster.

68 Stat. 295.
12 USC 1701g-5.

(b) The Secretary of Housing and Urban Development is authorized to refinance any note or other obligation which is held by him in connection with any loan made by the Department of Housing and Urban Development or its predecessor in interest, or which is included within the revolving fund for liquidating programs established by the Independent Offices Appropriation Act of 1955, where he finds such refinancing necessary because of the loss, destruction, or damage (as a result of a major disaster) to property or facilities securing such obligations. The Secretary may authorize a suspension in the payment of principal and interest charges on, and an additional extension in the maturity of, any such loan for a period not to exceed five years if he determines that such action is necessary to avoid severe financial hardship.

AID TO MAJOR SOURCES OF EMPLOYMENT

SEC. 237. (a) The Small Business Administration in the case of a nonagricultural enterprise, and the Farmers Home Administration in the case of an agricultural enterprise, are authorized to provide any industrial, commercial, agricultural, or other enterprise, which has constituted a major source of employment in an area suffering a major disaster and which is no longer in substantial operation as a result of such disaster, a loan in such amount as may be necessary to enable such enterprise to resume operations in order to assist in restoring the economic viability of the disaster area. Loans authorized by this section shall be made without regard to limitations on the size of

loans which may otherwise be imposed by any other provision of law or regulation promulgated pursuant thereto.

(b) Assistance under this section shall be in addition to any other Federal disaster assistance, except that such other assistance may be adjusted or modified to the extent deemed appropriate by the Director under the authority of section 208 of this Act. Any loan made under this section shall be subject to the interest requirements of section 234 of this Act, but the President, if he deems it necessary, may defer payments of principal and interest for a period not to exceed three years after the date of the loan. Any such deferred payments shall bear interest at the rate determined under section 234 of this Act.

FOOD COUPONS AND DISTRIBUTION

SEC. 238. (a) Whenever the President determines that, as a result of a major disaster, low-income households are unable to purchase adequate amounts of nutritious food, he is authorized, under such terms and conditions as he may prescribe, to distribute through the Secretary of Agriculture coupon allotments to such households pursuant to the provisions of the Food Stamp Act of 1964 and to make surplus commodities available pursuant to the provisions of section 203 of this Act.

78 Stat. 703.
7 USC 2011 note.

(b) The President, through the Secretary of Agriculture, is authorized to continue to make such coupon allotments and surplus commodities available to such households for so long as he determines necessary, taking into consideration such factors as he deems appropriate, including the consequences of the major disaster on the earning power of the households to which assistance is made available under this section.

(c) Nothing in this section shall be construed as amending or otherwise changing the provisions of the Food Stamp Act of 1964 except as they relate to the availability of food stamps in a major disaster area.

LEGAL SERVICES

SEC. 239. Whenever the Director determines that low-income individuals are unable to secure legal services adequate to meet their needs as a consequence of a major disaster, consistent with the goals of the programs authorized by this Act, the Director shall assure that such programs are conducted with the advice and assistance of appropriate Federal agencies and State and local bar associations.

UNEMPLOYMENT ASSISTANCE

SEC. 240. The President is authorized to provide to any individual unemployed as a result of a major disaster, such assistance as he deems appropriate while such individual is unemployed. Such assistance as the President shall provide shall not exceed to maximum amount and the maximum duration of payment under the unemployment compensation program of the State in which the disaster occurred, and the amount of assistance under this section to any such individual shall be reduced by any amount of unemployment compensation or of private income protection insurance compensation available to such individual for such period of unemployment.

COMMUNITY DISASTER GRANTS

SEC. 241. The President is authorized to make grants to any local government which, as the result of a major disaster, has suffered a substantial loss of property tax revenue (both real and personal). Grants made under this section may be made for the tax year in which the disaster occurred and for each of the following two tax years. The grant for any tax year shall not exceed the difference between the annual average of all property tax revenues received by the local government during the three-tax-year period immediately preceding the tax year in which the major disaster occurred and the actual property tax revenue received by the local government for the tax year in which the disaster occurred and for each of the two tax years following the major disaster but only if there has been no reduction in the tax rates and the tax assessment valuation factors of the local government. If there has been a reduction in the tax rates or the tax assessment valuation factors then, for the purpose of determining the amount of a grant under this section for the year or years when such reduction is in effect, the President shall use the tax rates and tax assessment valuation factors of the local government in effect at the time of the disaster without reduction, in order to determine the property tax revenues which would have been received by the local government but for such reduction.

TIMBER SALE CONTRACTS

SEC. 242. (a) Where an existing timber sale contract between the Secretary of Agriculture or the Secretary of the Interior and a timber purchaser does not provide relief from major physical change not due to negligence of the purchaser prior to approval of construction of any section of specified road or of any other specified development facility and, as a result of a major disaster, a major physical change results in additional construction work in connection with such road or facility by such purchaser with an estimated cost, as determined by the appropriate Secretary, (1) of more than \$1,000 for sales under one million board feet, (2) of more than \$1 per thousand board feet for sales of one of three million board feet, or (3) of more than \$3,000 for sales over three million board feet, such increased construction cost shall be borne by the United States.

(b) If the Secretary determines that damages are so great that restoration, reconstruction, or construction is not practical under the cost-sharing arrangement authorized by subsection (a) of this section, the Secretary may allow cancellation of the contract notwithstanding contrary provisions therein.

(c) The Secretary of Agriculture is authorized to reduce to seven days the minimum period of advance public notice required by the first section of the Act of June 4, 1897 (16 U.S.C. 476), in connection with the sale of timber from national forests, whenever the Secretary determines that (1) the sale of such timber will assist in the construction of any area of a State damaged by a major disaster, (2) the sale of such timber will assist in sustaining the economy of such area, or (3) the sale of such timber is necessary to salvage the value of timber damaged in such major disaster or to protect undamaged timber.

(d) The President, when he determines it to be in the public interest, and acting through the Director of Emergency Preparedness, is authorized to make grants to any State or local government for the purpose of removing from privately owned lands timber damaged as a result of a major disaster, and such State or local government is

³⁰ Stat. 35;
³¹ Stat. 661;
⁶⁶ Stat. 95.

authorized upon application, to make payments out of such grants to any person for reimbursement of expenses actually incurred by such person in the removal of damaged timber, not to exceed the amount that such expenses exceed the salvage value of such timber.

MINIMUM STANDARDS FOR RESIDENTIAL STRUCTURE RESTORATION

SEC. 243. No loan or grant made by any relief organization operating under the supervision of the Director, for the repair, restoration, reconstruction, or replacement of any residential structure located in a major disaster area shall be made unless such structure will be repaired, restored, reconstructed, or replaced in accordance with applicable standards of safety, decency, and sanitation and in conformity with applicable building codes and specifications.

FEDERAL FACILITIES

SEC. 251. The President may authorize any Federal agency to repair, reconstruct, restore, or replace any facility owned by the United States and under the jurisdiction of such agency which is damaged or destroyed by any major disaster if he determines that such repair, reconstruction, restoration, or replacement is of such importance and urgency that it cannot reasonably be deferred pending the enactment of specific authorizing legislation or the making of an appropriation for such purposes. In order to carry out the provisions of this section, such repair, reconstruction, restoration, or replacement may be begun notwithstanding a lack or an insufficiency of funds appropriated for such purpose, where such lack or insufficiency can be remedied by the transfer, in accordance with law, of funds appropriated to that agency for another purpose.

STATE AND LOCAL GOVERNMENT FACILITIES

SEC. 252. (a) The President is authorized to make contributions to State or local governments to repair, restore, reconstruct, or replace public facilities belonging to such State or local governments which were damaged or destroyed by a major disaster, except that the Federal contribution therefor shall not exceed 100 per centum of the net cost of repairing, restoring, reconstructing, or replacing any such facility on the basis of the design of such facility as it existed immediately prior to such disaster and in conformity with applicable codes, specifications, and standards.

Federal contributions.

(b) In the case of any such public facilities which were in the process of construction when damaged or destroyed by a major disaster, the Federal contribution shall not exceed 50 per centum of the net costs of restoring such facilities substantially to their prior to such disaster condition and of completing construction not performed prior to the major disaster to the extent the increase of such cost over the original construction cost is attributable to changed conditions resulting from a major disaster.

Limitation.

(c) For the purposes of this section "public facility" includes any flood control, navigation, irrigation, reclamation, public power, sewage treatment and collection, water supply and distribution, watershed development, or airport facility, any non-Federal-aid street, road, or highway, and any other public building, structure, or system, other than one used exclusively for recreation purposes.

"Public facility."

PRIORITY TO CERTAIN APPLICATIONS FOR PUBLIC FACILITY AND PUBLIC HOUSING ASSISTANCE

SEC. 253. In the processing of applications for assistance, priority and immediate consideration may be given, during such period, not to exceed six months, as the President shall prescribe by proclamation, to applications from public bodies situated in major disaster areas, under the following Acts:

69 Stat. 642;
75 Stat. 175.
42 USC 1491.

50 Stat. 888.
42 USC 1401.

69 Stat. 641;
78 Stat. 799.
40 USC 462.

79 Stat. 490;
82 Stat. 534.
42 USC 3102.
75 Stat. 308;
80 Stat. 1318.
7 USC 1926.

- (1) title II of the Housing Amendments of 1955, or any other Act providing assistance for repair, construction, or extension of public facilities;
- (2) the United States Housing Act of 1937 for the provision of low-rent housing;
- (3) section 702 of the Housing Act of 1954 for assistance in public works planning;
- (4) section 702 of the Housing and Urban Development Act of 1965 providing for grants for public facilities; or
- (5) section 306 of the Consolidated Farmers Home Administration Act.

RELOCATION ASSISTANCE

Post, p. 1903.

SEC. 254. Notwithstanding any other provision of law, no person otherwise eligible for any kind of relocation assistance payment authorized under section 114 of the Housing Act of 1949 shall be denied such eligibility as a result of his being unable, because of a major disaster as determined by the President, to reoccupy property from which he was displaced by such disaster.

TITLE III—MISCELLANEOUS

TECHNICAL AMENDMENTS

82 Stat. 526.

SEC. 301. (a) Section 701(a)(3)(B)(ii) of the Housing Act of 1954 (40 U.S.C. 461(a)(3)(B)(ii)) is amended to read as follows: "(ii) have suffered substantial damage as a result of a major disaster as determined by the President pursuant to the Disaster Relief Act of 1970".

67 Stat. 121.

(b) Section 8(b)(2) of the National Housing Act (12 U.S.C. 1706c (b)(2)) is amended by striking out of the last proviso "section 2(a) of the Act entitled 'An Act to authorize Federal assistance to States and local governments in major disasters, and for other purposes' (Public Law 875, Eighty-first Congress, approved September 30, 1950)" and inserting in lieu thereof "section 102(1) of the Disaster Relief Act of 1970".

68 Stat. 592;
83 Stat. 383.

(c) Section 203(h) of the National Housing Act (12 U.S.C. 1709(h)) is amended by striking out "section 2(a) of the Act entitled 'An Act to authorize Federal assistance to States and local governments in major disasters and for other purposes' (Public Law 875, Eighty-first Congress, approved September 30, 1950), as amended" and inserting in lieu thereof "section 102(1) of the Disaster Relief Act of 1970".

80 Stat. 1317.

(d) Section 221(f) of the National Housing Act (12 U.S.C. 1715(f)) is amended by striking out of the last paragraph "the Act entitled 'An Act to authorize Federal assistance to States and local governments in major disasters, and for other purposes', approved September 30, 1950, as amended (42 U.S.C. 1855-1855g)" and inserting in lieu thereof "the Disaster Relief Act of 1970".

(e) Section 7(a)(1)(A) of the Act of September 30, 1950 (Public Law 874, Eighty-first Congress, as amended; 20 U.S.C. 241-1(a)(1)(A)), is amended by striking out "pursuant to section 2(a) of the Act of September 30, 1950 (42 U.S.C. 1855a(a))" and inserting in lieu thereof "pursuant to section 102(1) of the Disaster Relief Act of 1970".

81 Stat. 811.

(f) Section 16(a) of the Act of September 23, 1950 (79 Stat. 1158; 20 U.S.C. 646(a)) is amended by striking out "section 2(a) of the Act of September 30, 1950 (42 U.S.C. 1855a(a))" and inserting in lieu thereof "section 102(1) of the Disaster Relief Act of 1970".

(g) Section 408(a) of the Higher Education Facilities Act of 1963 (20 U.S.C. 758(a)) is amended by striking out "section 2(a) of the Act of September 30, 1950 (42 U.S.C. 1855a(a))" and inserting in lieu thereof "section 102(1) of the Disaster Relief Act of 1970".

80 Stat. 1318.

(h) Section 165(h)(2) of the Internal Revenue Code of 1954, relating to disaster losses (26 U.S.C. 165(h)(2)) is amended to read as follows:

76 Stat. 51.

"(2) occurring in an area subsequently determined by the President of the United States to warrant assistance by the Federal Government under the Disaster Relief Act of 1970;"

(i) Section 5064(a) of the Internal Revenue Code of 1954 (26 U.S.C. 5064(a)), relating to losses caused by disaster, is amended by striking out "the Act of September 30, 1950 (42 U.S.C. 1855)" and inserting in lieu thereof "the Disaster Relief Act of 1970".

72 Stat. 1337.

(j) Section 5708(a) of the Internal Revenue Code of 1954 (26 U.S.C. 5708(a)), relating to losses caused by disaster, is amended by striking out "the Act of September 30, 1950 (42 U.S.C. 1855)" and inserting in lieu thereof "the Disaster Relief Act of 1970".

72 Stat. 1420.

(k) Section 3 of the Act of June 30, 1954 (68 Stat. 330; 48 U.S.C. 1681), is amended by striking out of the last sentence "section 2 of the Act of September 30, 1950 (64 Stat. 1109), as amended (42 U.S.C. 1855a)" and inserting in lieu thereof "section 102(1) of the Disaster Relief Act of 1970".

82 Stat. 1213.

(l) Whenever reference is made in any provision of law (other than this Act), regulation, rule, record, or document of the United States to the Act of September 30, 1950 (64 Stat. 1109), or any provision of such Act, such reference shall be deemed to be a reference to the Disaster Relief Act of 1970 or to the appropriate provision of the Disaster Relief Act of 1970 unless no such provision is included therein.

REPEAL OF EXISTING LAW

SEC. 302. The following Acts are hereby repealed:

- (1) the Act of September 30, 1950 (64 Stat. 1109);
- (2) the Disaster Relief Act of 1966, except section 7 (80 Stat. 1316); and
- (3) the Disaster Relief Act of 1969 (83 Stat. 125).

42 USC 1855.

42 USC 1855aa
note.42 USC 1855aaa
note.

PRIOR ALLOCATION OF FUNDS

SEC. 303. Funds allocated before the date of enactment of this Act under a Federal-State Disaster Agreement for the relief of a major disaster as defined in the Act of September 30, 1950 (Public Law 875, Eighty-first Congress), and not expended on the date of enactment of this Act may be used by the State to make payments to any person for reimbursement of expenses actually incurred by such person in the removal of debris from community areas, but not to exceed the amount that such expenses exceed the salvage value of such debris, or in other-

64 Stat. 1109.
42 USC 1855.

wise carrying out the purposes of such Act of September 30, 1950, or this Act.

EFFECTIVE DATE

SEC. 304. This Act shall take effect immediately upon its enactment, except that sections 226(b), 237, 241, 252(a), and 254 shall take effect as of August 1, 1969, and sections 231, 232, and 233 shall take effect as of April 1, 1970.

Approved December 31, 1970.

Public Law 91-607

December 31, 1970
[H. R. 6778]

AN ACT

To amend the Bank Holding Company Act of 1956, and for other purposes.

Bank Holding
Company Act
Amendments of
1970.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Bank Holding Company Act Amendments of 1970".

TITLE I—BANK HOLDING COMPANIES

"Bank holding
company."
80 Stat. 236.

SEC. 101. (a) Section 2(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a)) is amended to read as follows:

"SEC. 2. (a)(1) Except as provided in paragraph (5) of this subsection, 'bank holding company' means any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of this Act.

"(2) Any company has control over a bank or over any company if—

"(A) the company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company;

"(B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or

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APPENDIX D. DISASTER RELIEF ACT OF 1974 PUB. L. NO. 93-288

[DISASTER RELIEF ACT OF 1974]

88 STAT.]

PUBLIC LAW 93-288—MAY 22, 1974

143

Public Law 93-287

AN ACT

To authorize the Secretary of State or such officer as he may designate to conclude an agreement with the People's Republic of China for indemnification for any loss or damage to objects in the "Exhibition of the Archeological Finds of the People's Republic of China" while in the possession of the Government of the United States.

May 21, 1974
[S. 3304]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of State or such officer as he may designate is authorized to conclude an agreement with the Government of the People's Republic of China for indemnification of such Government, in accordance with the terms of the agreement, for any loss or damage suffered by objects in the exhibition of the archeological finds of the People's Republic of China from the time such objects are handed over in Toronto, Canada, to a representative of the Government of the United States to the time they are handed over in Peking, China, to a representative of the Government of the People's Republic of China.

Exhibition of
the Archeological
Finds of the
People's Repub-
lic of China.
Indemnification
agreement.

Approved May 21, 1974.

Public Law 93-288

AN ACT

Entitled the "Disaster Relief Act Amendments of 1974"

May 22, 1974
[S. 3062]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Disaster Relief Act of 1974".

Disaster Relief
Act of 1974.
42 USC 5121
note.

TITLE I—FINDINGS, DECLARATIONS, AND DEFINITIONS

FINDINGS AND DECLARATIONS

SEC. 101. (a) The Congress hereby finds and declares that—

42 USC 5121.

(1) because disasters often cause loss of life, human suffering, loss of income, and property loss and damage; and

(2) because disasters often disrupt the normal functioning of governments and communities, and adversely affect individuals and families with great severity;

special measures, designed to assist the efforts of the affected States in expediting the rendering of aid, assistance, and emergency services, and the reconstruction and rehabilitation of devastated areas, are necessary.

(b) It is the intent of the Congress, by this Act, to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters by—

- (1) revising and broadening the scope of existing disaster relief programs;
- (2) encouraging the development of comprehensive disaster preparedness and assistance plans, programs, capabilities, and organizations by the States and by local governments;
- (3) achieving greater coordination and responsiveness of disaster preparedness and relief programs;
- (4) encouraging individuals, States, and local governments to protect themselves by obtaining insurance coverage to supplement or replace governmental assistance;
- (5) encouraging hazard mitigation measures to reduce losses from disasters, including development of land use and construction regulations;
- (6) providing Federal assistance programs for both public and private losses sustained in disasters; and
- (7) providing a long-range economic recovery program for major disaster areas.

DEFINITIONS

42 USC 5122.

SEC. 102. As used in this Act—

- (1) “Emergency” means any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, fire, explosion, or other catastrophe in any part of the United States which requires Federal emergency assistance to supplement State and local efforts to save lives and protect property, public health and safety or to avert or lessen the threat of a disaster.
- (2) “Major disaster” means any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, fire, explosion, or other catastrophe in any part of the United States which, in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under this Act, above and beyond emergency services by the Federal Government, to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.
- (3) “United States” means the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Canal Zone, and the Trust Territory of the Pacific Islands.
- (4) “State” means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Canal Zone, or the Trust Territory of the Pacific Islands.
- (5) “Governor” means the chief executive of any State.
- (6) “Local government” means (A) any county, city, village, town, district, or other political subdivision of any State, any Indian tribe or authorized tribal organization, or Alaska Native village or organization, and (B) includes any rural community or unincorporated town or village or any other public entity for which an application for assistance is made by a State or political subdivision thereof.
- (7) “Federal agency” means any department, independent establishment, Government corporation, or other agency of the executive branch of the Federal Government, including the United States Postal Service, but shall not include the American National Red Cross.

TITLE II—DISASTER PREPAREDNESS ASSISTANCE

FEDERAL AND STATE DISASTER PREPAREDNESS PROGRAMS

SEC. 201. (a) The President is authorized to establish a program of disaster preparedness that utilizes services of all appropriate agencies (including the Defense Civil Preparedness Agency) and includes—

42 USC 5131.

- (1) preparation of disaster preparedness plans for mitigation, warning, emergency operations, rehabilitation, and recovery;
- (2) training and exercises;
- (3) postdisaster critiques and evaluations;
- (4) annual review of programs;
- (5) coordination of Federal, State, and local preparedness programs;
- (6) application of science and technology;
- (7) research.

(b) The President shall provide technical assistance to the States in developing comprehensive plans and practicable programs for preparation against disasters, including hazard reduction, avoidance, and mitigation; for assistance to individuals, businesses, and State and local governments following such disasters; and for recovery of damaged or destroyed public and private facilities.

Technical assistance.

(c) Upon application by a State, the President is authorized to make grants, not to exceed in the aggregate to such State \$250,000, for the development of plans, programs, and capabilities for disaster preparedness and prevention. Such grants shall be applied for within one year from the date of enactment of this Act. Any State desiring financial assistance under this section shall designate or create an agency to plan and administer such a disaster preparedness program, and shall, through such agency, submit a State plan to the President, which shall—

Grants to States.

State plan, submitted to President.

- (1) set forth a comprehensive and detailed State program for preparation against and assistance following, emergencies and major disasters, including provisions for assistance to individuals, businesses, and local governments; and

- (2) include provisions for appointment and training of appropriate staffs, formulation of necessary regulations and procedures and conduct of required exercises.

(d) The President is authorized to make grants not to exceed 50 per centum of the cost of improving, maintaining and updating State disaster assistance plans, except that no such grant shall exceed \$25,000 per annum to any State.

Grants, limitations.

DISASTER WARNINGS

SEC. 202. (a) The President shall insure that all appropriate Federal agencies are prepared to issue warnings of disasters to State and local officials.

42 USC 5132.

(b) The President shall direct appropriate Federal agencies to provide technical assistance to State and local governments to insure that timely and effective disaster warning is provided.

(c) The President is authorized to utilize or to make available to Federal, State, and local agencies the facilities of the civil defense communications system established and maintained pursuant to section 201(c) of the Federal Civil Defense Act of 1950, as amended (50 U.S.C. App. 2281(c)), or any other Federal communications system for the purpose of providing warning to governmental authorities and the civilian population in areas endangered by disasters.

(d) The President is authorized to enter into agreements with the officers or agents of any private or commercial communications systems who volunteer the use of their systems on a reimbursable or nonreimbursable basis for the purpose of providing warning to governmental authorities and the civilian population endangered by disasters.

TITLE III—DISASTER ASSISTANCE ADMINISTRATION

PROCEDURES

42 USC 5141.

SEC. 301. (a) All requests for a determination by the President that an emergency exists shall be made by the Governor of the affected State. Such request shall be based upon the Governor's finding that the situation is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary. The Governor's request will furnish information describing State and local efforts and resources which have been or will be used to alleviate the emergency, and will define the type and extent of Federal aid required. Based upon such Governor's request, the President may determine that an emergency exists which warrants Federal assistance.

(b) All requests for a declaration by the President that a major disaster exists shall be made by the Governor of the affected State. Such Governor's request shall be based upon a finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary. As a part of this request, and as a prerequisite to major disaster assistance under the Act, the Governor shall take appropriate action under State law and direct execution of the State's emergency plan. He shall furnish information on the extent and nature of State resources which have been or will be used to alleviate the conditions of the disaster, and shall certify that for the current disaster, State and local government obligations and expenditures (of which State commitments must be a significant proportion) will constitute the expenditure of a reasonable amount of the funds of such State and local governments for alleviating the damage, loss, hardship, or suffering resulting from such disaster. Based upon such Governor's request, the President may declare that a major disaster exists, or that an emergency exists.

FEDERAL ASSISTANCE

42 USC 5142.

SEC. 302. (a) In the interest of providing maximum mobilization of Federal assistance under this Act, the President shall coordinate, in such manner as he may determine, the activities of all Federal agencies

providing disaster assistance. The President may direct any Federal agency, with or without reimbursement, to utilize its available personnel, equipment, supplies, facilities, and other resources including managerial and technical services in support of State and local disaster assistance efforts. The President may prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this Act, and he may exercise any power or authority conferred on him by any section of this Act either directly or through such Federal agency as he may designate.

Rules and regulations.

(b) Any Federal agency charged with the administration of a Federal assistance program is authorized, if so requested by the applicant State or local authorities, to modify or waive, for a major disaster, such administrative conditions for assistance as would otherwise prevent the giving of assistance under such programs if the inability to meet such conditions is a result of the major disaster.

(c) Notwithstanding any other provision of law, any repair, restoration, reconstruction, or replacement of farm fencing damaged or destroyed as a result of any major disaster shall be considered an emergency conservation measure eligible for payments under chapter I of the Third Supplemental Appropriation Act, 1957, or any other provision of law.

71 Stat. 176.

COORDINATING OFFICERS

SEC. 203. (a) Immediately upon his declaration of a major disaster, the President shall appoint a Federal coordinating officer to operate in the affected area.

42 USC 5143.

(b) In order to effectuate the purposes of this Act, the Federal coordinating officer, within the affected area, shall—

(1) make an initial appraisal of the types of relief most urgently needed;

(2) establish such field offices as he deems necessary and as are authorized by the President;

(3) coordinate the administration of relief, including activities of the State and local governments, the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief or disaster assistance organizations, which agree to operate under his advice or direction, except that nothing contained in this Act shall limit or in any way affect the responsibilities of the American National Red Cross under the Act of January 5, 1905, as amended (33 Stat. 599); and

36 USC 1.

(4) take such other action, consistent with authority delegated to him by the President, and consistent with the provisions of this Act, as he may deem necessary to assist local citizens and public officials in promptly obtaining assistance to which they are entitled.

(c) When the President determines assistance under this Act is necessary, he shall request that the Governor of the affected State designate a State coordinating officer for the purpose of coordinating State and local disaster assistance efforts with those of the Federal Government.

State coordinating officer.

EMERGENCY SUPPORT TEAMS

42 USC 5144.

SEC. 304. The President shall form emergency support teams of Federal personnel to be deployed in an area affected by a major disaster or emergency. Such emergency support teams shall assist the Federal coordinating officer in carrying out his responsibilities pursuant to this Act. Upon request of the President, the head of any Federal agency is directed to detail to temporary duty with the emergency support teams on either a reimbursable or nonreimbursable basis, as is determined necessary by the President, such personnel within the administrative jurisdiction of the head of the Federal agency as the President may need or believe to be useful for carrying out the functions of the emergency support teams, each such detail to be without loss of seniority, pay, or other employee status.

EMERGENCY ASSISTANCE

42 USC 5145.

SEC. 305. (a) In any emergency, the President may provide assistance to save lives and protect property and public health and safety. (b) The President may provide such emergency assistance by directing Federal agencies to provide technical assistance and advisory personnel to the affected State to assist the State and local governments in—

(1) the performance of essential community services; warning of further risks and hazards; public information and assistance in health and safety measures; technical advice on management and control; and reduction of immediate threats to public health and safety; and

(2) the distribution of medicine, food, and other consumable supplies, or emergency assistance.

(c) In addition, in any emergency, the President is authorized to provide such other assistance under this Act as the President deems appropriate.

COOPERATION OF FEDERAL AGENCIES IN RENDERING DISASTER ASSISTANCE

42 USC 5146.

SEC. 306. (a) In any major disaster or emergency, Federal agencies are hereby authorized, on the direction of the President, to provide assistance by—

(1) utilizing or lending, with or without compensation therefor, to States and local governments, their equipment, supplies, facilities, personnel, and other resources, other than the extension of credit under the authority of any Act;

(2) distributing or rendering, through the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief and disaster assistance organizations, or otherwise, medicine, food and other consumable supplies, or emergency assistance;

(3) donating or lending equipment and supplies, including that determined in accordance with applicable laws to be surplus to the needs and responsibilities of the Federal Government, to State and local governments for use or distribution by them for the purposes of this Act; and

(4) Performing on public or private lands or waters any emergency work or services essential to save lives and to protect and preserve property, public health and safety, including but not limited to: search and rescue, emergency medical care, emergency mass care, emergency shelter, and provisions of food, water, medicine, and other essential needs, including movement of supplies or persons; clearance of roads and construction of temporary bridges necessary to the performance of emergency tasks and essential community services; provision of temporary facilities for schools and other essential community services; demolition of unsafe structures that endanger the public; warning of further risks and hazards; public information and assistance on health and safety measures; technical advice to State and local governments on disaster management and control; reduction of immediate threats to life, property, and public health and safety; and making contributions to State or local governments for the purpose of carrying out the provisions of this paragraph.

(b) Work performed under this section shall not preclude additional Federal assistance under any other section of this Act.

REIMBURSEMENT

SEC. 307. Federal agencies may be reimbursed for expenditures under this Act from funds appropriated for the purposes of this Act. Any funds received by Federal agencies as reimbursement for services or supplies furnished under the authority of this Act shall be deposited to the credit of the appropriation or appropriations currently available for such services or supplies.

42 USC 5147.

NONLIABILITY

SEC. 308. The Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this Act.

42 USC 5148.

PERFORMANCE OF SERVICES

SEC. 309. (a) In carrying out the purposes of this Act, any Federal agency is authorized to accept and utilize the services or facilities of any State or local government, or of any agency, office, or employee thereof, with the consent of such government.

42 USC 5149.

(b) In performing any services under this Act, any Federal agency is authorized—

(1) to appoint and fix the compensation of such temporary personnel as may be necessary, without regard to the provisions of title 5, United States Code, governing appointments in competitive service;

5 USC 101 et seq.

(2) to employ experts and consultants in accordance with the provisions of section 3109 of such title, without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates; and

5 USC 5101, 5331.

(3) to incur obligations on behalf of the United States by contract or otherwise for the acquisition, rental, or hire of equipment, services, materials, and supplies for shipping, drayage, travel, and communications, and for the supervision and administration of such activities. Such obligations, including obligations arising out of the temporary employment of additional

personnel, may be incurred by an agency in such amount as may be made available to it by the President.

USE OF LOCAL FIRMS AND INDIVIDUALS

42 USC 5150.

SEC. 310. In the expenditure of Federal funds for debris clearance, distribution of supplies, reconstruction, and other major disaster assistance activities which may be carried out by contract or agreement with private organizations, firms, or individuals, preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster.

NONDISCRIMINATION IN DISASTER ASSISTANCE

42 USC 5151.

SEC. 311. (a) The President shall issue, and may alter and amend, such regulations as may be necessary for the guidance of personnel carrying out Federal assistance functions at the site of a major disaster or emergency. Such regulations shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status.

(b) As a condition of participation in the distribution of assistance or supplies under this Act or of receiving assistance under section 402 or 404 of this Act, governmental bodies and other organizations shall be required to comply with regulations relating to nondiscrimination promulgated by the President, and such other regulations applicable to activities within an area affected by a major disaster or emergency as he deems necessary for the effective coordination of relief efforts.

USE AND COORDINATION OF RELIEF ORGANIZATIONS

42 USC 5152.

SEC. 312. (a) In providing relief and assistance under this Act, the President may utilize, with their consent, the personnel and facilities of the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief or disaster assistance organizations, in the distribution of medicine, food, supplies, or other items, and in the restoration, rehabilitation, or reconstruction of community services housing and essential facilities, whenever the President finds that such utilization is necessary.

(b) The President is authorized to enter into agreements with the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief or disaster assistance organizations under which the disaster relief activities of such organizations may be coordinated by the Federal coordinating officer whenever such organizations are engaged in providing relief during and after a major disaster or emergency. Any such agreement shall include provisions assuring that use of Federal facilities, supplies, and services will be in compliance with regulations prohibiting duplication of benefits and guaranteeing nondiscrimination promulgated by the President under this Act, and such other regulation as the President may require.

PRIORITY TO CERTAIN APPLICATIONS FOR PUBLIC FACILITY AND PUBLIC HOUSING ASSISTANCE

42 USC 5153.

SEC. 313. (a) In the processing of applications for assistance, priority and immediate consideration shall be given by the head of the appropriate Federal agency, during such period as the President shall

prescribe, to applications from public bodies situated in areas affected by major disasters, under the following Acts:

- (1) title II of the Housing Amendments of 1955, or any other Act providing assistance for repair, construction, or extension of public facilities; 42 USC 1491.
 - (2) the United States Housing Act of 1937 for the provision of low-rent housing; 42 USC 1430.
 - (3) section 702 of the Housing Act of 1954 for assistance in public works planning; 40 USC 462.
 - (4) section 702 of the Housing and Urban Development Act of 1965 providing for grants for public facilities; 42 USC 3102.
 - (5) section 306 of the Consolidated Farmers Home Administration Act; 7 USC 1926.
 - (6) the Public Works and Economic Development Act of 1965, as amended; 42 USC 3121 note.
 - (7) the Appalachian Regional Development Act of 1965, as amended; or 40 USC app. 1.
 - (8) title II of the Federal Water Pollution Control Act, as amended. 33 USC 1281.
- (b) In the obligation of discretionary funds or funds which are not allocated among the States or political subdivisions of a State, the Secretary of Housing and Urban Development and the Secretary of Commerce shall give priority to applications for projects in major disaster areas in which a Recovery Planning Council has been designated pursuant to title VIII of the Public Works and Economic Development Act of 1965. *Post*, p. 160.

INSURANCE

SEC. 314. (a) (1) An applicant for assistance under section 402 or 419 of this Act or section 803 of the Public Works and Economic Development Act of 1965, shall comply with regulations prescribed by the President to assure that, with respect to any property to be replaced, restored, repaired, or constructed with such assistance, such types and extent of insurance will be obtained and maintained as may be reasonably available, adequate, and necessary to protect against future loss to such property.

(2) In making his determination with respect to such availability, adequacy and necessity, the President shall not require greater types and extent of insurance than are certified to him as reasonable by the appropriate State insurance commissioner responsible for regulation of such insurance.

(b) No applicant for assistance under section 402 or 419 of this Act or section 803 of the Public Works and Economic Development Act of 1965, shall receive such assistance for any property or part thereof for which he has previously received assistance under this Act unless all insurance required pursuant to this section has been obtained and maintained with respect to such property.

(c) A State may elect to act as a self-insurer with respect to any or all of the facilities belonging to it. Such an election, if declared in writing at the time of accepting assistance under section 402 or 419 of this Act or section 803 of the Public Works and Economic Development Act of 1965, or subsequently, and accompanied by a plan for self-insurance which is satisfactory to the President, shall be deemed compliance with subsection (a) of this section. No such self-insurer shall receive assistance under such sections for any property or part thereof for which it has previously received assistance under this Act, to the extent that insurance for such property or part thereof would have been reasonably available.

42 USC 5154.

Post, p. 161.

DUPLICATION OF BENEFITS

42 USC 5155.

SEC. 315. (a) The President, in consultation with the head of each Federal agency administering any program providing financial assistance to persons, business concerns, or other entities suffering losses as the result of a major disaster, shall assure that no such person, business concern, or other entity will receive such assistance with respect to any part of such loss as to which he has received financial assistance under any other program.

(b) The President shall assure that no person, business concern, or other entity receives any Federal assistance for any part of a loss suffered as the result of a major disaster if such person, concern, or entity received compensation from insurance or any other source for that part of such a loss. Partial compensation for a loss or a part of a loss resulting from a major disaster shall not preclude additional Federal assistance for any part of such a loss not compensated otherwise.

(c) Whenever the President determines (1) that a person, business concern, or other entity has received assistance under this Act for a loss and that such person, business concern or other entity received assistance for the same loss from another source, and (2) that the amount received from all sources exceeded the amount of the loss, he shall direct such person, business concern, or other entity to pay to the Treasury an amount, not to exceed the amount of Federal assistance received, sufficient to reimburse the Federal Government for that part of the assistance which he deems excessive.

REVIEWS AND REPORTS

Report to
Congress.
42 USC 5156.

SEC. 316. The President shall conduct annual reviews of the activities of Federal agencies and State and local governments providing disaster preparedness and assistance, in order to assure maximum coordination and effectiveness of such programs, and shall from time to time report thereon to the Congress.

CRIMINAL AND CIVIL PENALTIES

42 USC 5157.

SEC. 317. (a) Any individual who fraudulently or willfully misstates any fact in connection with a request for assistance under this Act shall be fined not more than \$10,000 or imprisoned for not more than one year or both for each violation.

(b) Any individual who knowingly violates any order or regulation under this Act shall be subject to a civil penalty of not more than \$5,000 for each violation.

(c) Whoever knowingly misapplies the proceeds of a loan or other cash benefit obtained under any section of this Act shall be subject to a fine in an amount equal to one and one-half times the original principal amount of the loan or cash benefit.

AVAILABILITY OF MATERIALS

42 USC 5158.

SEC. 318. The President is authorized, at the request of the Governor of an affected State, to provide for a survey of construction materials needed in the area affected by a major disaster on an emergency basis for housing repairs, replacement housing, public facilities repairs and replacement, farming operations, and business enterprises and to take appropriate action to assure the availability and fair distribution of needed materials, including, where possible, the allocation of such materials for a period of not more than one hundred and eighty days after such major disaster. Any allocation program shall be imple-

mented by the President to the extent possible, by working with and through those companies which traditionally supply construction materials in the affected area. For the purposes of this section "construction materials" shall include building materials and materials required for repairing housing, replacement housing, public facilities repairs and replacement, and for normal farm and business operations.

*"Construction
materials."*

TITLE IV—FEDERAL DISASTER ASSISTANCE PROGRAMS

FEDERAL FACILITIES

SEC. 401. (a) The President may authorize any Federal agency to repair, reconstruct, restore, or replace any facility owned by the United States and under the jurisdiction of such agency which is damaged or destroyed by any major disaster if he determines that such repair, reconstruction, restoration, or replacement is of such importance and urgency that it cannot reasonably be deferred pending the enactment of specific authorizing legislation or the making of an appropriation for such purposes, or the obtaining of congressional committee approval.

42 USC 5171.

(b) In order to carry out the provisions of this section, such repair, reconstruction, restoration, or replacement may be begun notwithstanding a lack or an insufficiency of funds appropriated for such purpose, where such lack or insufficiency can be remedied by the transfer, in accordance with law, of funds appropriated to that agency for another purpose.

(c) In implementing this section, Federal agencies shall evaluate the natural hazards to which these facilities are exposed and shall take appropriate action to mitigate such hazards, including safe land-use and construction practices, in accordance with standards prescribed by the President.

REPAIR AND RESTORATION OF DAMAGED FACILITIES

SEC. 402. (a) The President is authorized to make contributions to State or local governments to help repair, restore, reconstruct, or replace public facilities belonging to such State or local governments which were damaged or destroyed by a major disaster.

42 USC 5172.

(b) The President is also authorized to make grants to help repair, restore, reconstruct, or replace private nonprofit educational, utility, emergency, medical, and custodial care facilities, including those for the aged or disabled, and facilities on Indian reservations as defined by the President, which were damaged or destroyed by a major disaster.

(c) For those facilities eligible under this section which were in the process of construction when damaged or destroyed by a major disaster, the grant shall be based on the net costs of restoring such facilities substantially to their predisaster condition.

(d) For the purposes of this section, "public facility" includes any publicly owned flood control, navigation, irrigation, reclamation, public power, sewage treatment and collection, water supply and distribution, watershed development, or airport facility, any non-Federal-aid street, road, or highway, any other public building, structure, or system including those used for educational or recreational purposes, and any park.

*"Public facil-
ity."*

(e) The Federal contribution for grants made under this section shall not exceed 100 per centum of the net cost of repairing, restoring, reconstructing, or replacing any such facility on the basis of the

Limitation.

design of such facility as it existed immediately prior to such disaster and in conformity with current applicable codes, specifications, and standards.

(f) In those cases where a State or local government determines that public welfare would not be best served by repairing, restoring, reconstructing, or replacing particular public facilities owned or controlled by that State or that local government which have been damaged or destroyed in a major disaster, it may elect to receive, in lieu of the contribution described in subsection (e) of this section, a contribution based on 90 per centum of the Federal estimate of the total cost of repairing, restoring, reconstructing, or replacing all damaged facilities owned by it within its jurisdiction. The cost of repairing, restoring, reconstructing, or replacing damaged or destroyed public facilities shall be estimated on the basis of the design of each such facility as it existed immediately prior to such disaster and in conformity with current applicable codes, specifications and standards. Funds contributed under this subsection may be expended either to repair or restore certain selected damaged public facilities or to construct new public facilities which the State or local government determines to be necessary to meet its needs for governmental services and functions in the disaster-affected area.

DEBRIS REMOVAL

42 USC 5173.

SEC. 403. (a) The President, whenever he determines it to be in the public interest, is authorized—

(1) through the use of Federal departments, agencies, and instrumentalities, to clear debris and wreckage resulting from a major disaster from publicly and privately owned lands and waters; and

(2) to make grants to any State or local government for the purpose of removing debris or wreckage resulting from a major disaster from publicly or privately owned lands and waters.

(b) No authority under this section shall be exercised unless the affected State or local government shall first arrange an unconditional authorization for removal of such debris or wreckage from public and private property, and, in the case of removal of debris or wreckage from private property, shall first agree to indemnify the Federal Government against any claim arising from such removal.

TEMPORARY HOUSING ASSISTANCE

42 USC 5174.

SEC. 404. (a) The President is authorized to provide, either by purchase or lease, temporary housing, including, but not limited to, unoccupied habitable dwellings, suitable rental housing, mobile homes or other readily fabricated dwellings for those who, as a result of a major disaster, require temporary housing. During the first twelve months of occupancy no rentals shall be established for any such accommodations, and thereafter rentals shall be established, based upon fair market value of the accommodations being furnished, adjusted to take into consideration the financial ability of the occupant. Any mobile home or readily fabricated dwelling shall be placed on a site complete with utilities provided either by the State or local government, or by the owner or occupant of the site who was displaced by the major disaster, without charge to the United States. The President may authorize installation of essential utilities at Federal expense and he may elect to provide other more economical or accessible sites when he determines such action to be in the public interest.

(b) The President is authorized to provide assistance on a temporary basis in the form of mortgage or rental payments to or on behalf of individuals and families who, as a result of financial hardship caused by a major disaster, have received written notice of dispossession or eviction from a residence by reason of foreclosure of any mortgage or lien, cancellation of any contract of sale, or termination of any lease, entered into prior to such disaster. Such assistance shall be provided for a period of not to exceed one year or for the duration of the period of financial hardship, whichever is the lesser.

(c) In lieu of providing other types of temporary housing after a major disaster, the President is authorized to make expenditures for the purpose of repairing or restoring to a habitable condition owner-occupied private residential structures made uninhabitable by a major disaster which are capable of being restored quickly to a habitable condition with minimal repairs. No assistance provided under this section may be used for major reconstruction or rehabilitation of damaged property.

(d) (1) Notwithstanding any other provision of law, any temporary housing acquired by purchase may be sold directly to individuals and families who are occupants of temporary housing at prices that are fair and equitable, as determined by the President.

(2) The President may sell or otherwise make available temporary housing units directly to States, other governmental entities, and voluntary organizations. The President shall impose as a condition of transfer under this paragraph a covenant to comply with the provisions of section 311 of this Act requiring nondiscrimination in occupancy of such temporary housing units. Such disposition shall be limited to units purchased under the provisions of subsection (a) of this section and to the purposes of providing temporary housing for disaster victims in emergencies or in major disasters.

Nondiscrimina-
tion.

PROTECTION OF ENVIRONMENT

SEC. 405. No action taken or assistance provided pursuant to sections 305, 306, or 403 of this Act, or any assistance provided pursuant to section 402 or 419 of this Act that has the effect of restoring facilities substantially as they existed prior to the disaster, shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852). Nothing in this section shall alter or affect the applicability of the National Environmental Policy Act of 1969 (83 Stat. 852) to other Federal actions taken under this Act or under any other provision of law.

42 USC 5175.

42 USC 4321
note.

MINIMUM STANDARDS FOR PUBLIC AND PRIVATE STRUCTURES

SEC. 406. As a condition of any disaster loan or grant made under the provisions of this Act, the recipient shall agree that any repair or construction to be financed therewith shall be in accordance with applicable standards of safety, decency, and sanitation and in conformity with applicable codes, specifications, and standards, and shall furnish such evidence of compliance with this section as may be required by regulation. As a further condition of any loan or grant made under the provisions of this Act, the State or local government shall agree that the natural hazards in the areas in which the proceeds of the grants or loans are to be used shall be evaluated and appropriate action shall be taken to mitigate such hazards, including safe land-use and construction practices, in accordance with standards prescribed or

42 USC 5176.

Natural hazards,
evaluation.

approved by the President after adequate consultation with the appropriate elected officials of general purpose local governments, and the State shall furnish such evidence of compliance with this section as may be required by regulation.

UNEMPLOYMENT ASSISTANCE

42 USC 5177.

Time limita-
tion.

Agreement with
States.

Reemployment
assistance serv-
ices.

SEC. 407. (a) The President is authorized to provide to any individual unemployed as a result of a major disaster such benefit assistance as he deems appropriate while such individual is unemployed. Such assistance as the President shall provide shall be available to an individual as long as the individual's unemployment caused by the major disaster continues or until the individual is reemployed in a suitable position, but no longer than one year after the major disaster is declared. Such assistance for a week of unemployment shall not exceed the maximum weekly amount authorized under the unemployment compensation law of the State in which the disaster occurred, and the amount of assistance under this section to any such individual for a week of unemployment shall be reduced by any amount of unemployment compensation or of private income protection insurance compensation available to such individual for such week of unemployment. The President is directed to provide such assistance through agreements with States which, in his judgment, have an adequate system for administering such assistance through existing State agencies.

(b) The President is further authorized for the purposes of this Act to provide reemployment assistance services under other laws to individuals who are unemployed as a result of a major disaster.

INDIVIDUAL AND FAMILY GRANT PROGRAMS

42 USC 5178.

Federal share.

Advances.

Limitation.

Regulations.

Administration
expenses, limi-
tation.

Effective date.
42 USC 5178
note.

SEC. 408. (a) The President is authorized to make a grant to a State for the purpose of such State making grants to meet disaster-related necessary expenses or serious needs of individuals or families adversely affected by a major disaster in those cases where such individuals or families are unable to meet such expenses or needs through assistance under other provisions of this Act, or from other means. The Governor of a State shall administer the grant program authorized by this section.

(b) The Federal share of a grant to an individual or a family under this section shall be equal to 75 per centum of the actual cost of meeting such an expense or need and shall be made only on condition that the remaining 25 per centum of such cost is paid to such individual or family from funds made available by a State. Where a State is unable immediately to pay its share, the President is authorized to advance to such State such 25 per centum share, and any such advance is to be repaid to the United States when such State is able to do so. No individual and no family shall receive any grant or grants under this section aggregating more than \$5,000 with respect to any one major disaster.

(c) The President shall promulgate regulations to carry out this section and such regulations shall include national criteria, standards, and procedures for the determination of eligibility for grants and the administration of grants made under this section.

(d) A State may expend not to exceed 3 per centum of any grant made by the President to it under subsection (a) of this section for expenses of administering grants to individuals and families under this section.

(e) This section shall take effect as of April 20, 1973.

FOOD COUPONS AND DISTRIBUTION

SEC. 409. (a) Whenever the President determines that, as a result of a major disaster, low-income households are unable to purchase adequate amounts of nutritious food, he is authorized, under such terms and conditions as he may prescribe, to distribute through the Secretary of Agriculture or other appropriate agencies coupon allotments to such households pursuant to the provisions of the Food Stamp Act of 1964 (P.L. 91-671; 84 Stat. 2048) and to make surplus commodities available pursuant to the provisions of this Act.

42 USC 5179.

(b) The President, through the Secretary of Agriculture or other appropriate agencies, is authorized to continue to make such coupon allotments and surplus commodities available to such households for so long as he determines necessary, taking into consideration such factors as he deems appropriate, including the consequences of the major disaster on the earning power of the households, to which assistance is made available under this section.

7 USC 2011
note.

(c) Nothing in this section shall be construed as amending or otherwise changing the provisions of the Food Stamp Act of 1964 except as they relate to the availability of food stamps in an area affected by a major disaster.

FOOD COMMODITIES

SEC. 410. (a) The President is authorized and directed to assure that adequate stocks of food will be ready and conveniently available for emergency mass feeding or distribution in any area of the United States which suffers a major disaster or emergency.

Emergency mass
feeding.
42 USC 5180.

(b) The Secretary of Agriculture shall utilize funds appropriated under section 32 of the Act of August 24, 1935 (7 U.S.C. 612c), to purchase food commodities necessary to provide adequate supplies for use in any area of the United States in the event of a major disaster or emergency in such area.

RELOCATION ASSISTANCE

SEC. 411. Notwithstanding any other provision of law, no person otherwise eligible for any kind of replacement housing payment under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) shall be denied such eligibility as a result of his being unable, because of a major disaster as determined by the President, to meet the occupancy requirements set by such Act.

42 USC 5181.

42 USC 4601
note.

LEGAL SERVICES

SEC. 412. Whenever the President determines that low-income individuals are unable to secure legal services adequate to meet their needs as a consequence of a major disaster, consistent with the goals of the programs authorized by this Act, the President shall assure that such programs are conducted with the advice and assistance of appropriate Federal agencies and State and local bar associations.

42 USC 5182.

CRISIS COUNSELING ASSISTANCE AND TRAINING

SEC. 413. The President is authorized (through the National Institute of Mental Health) to provide professional counseling services, including financial assistance to State or local agencies or private mental health organizations to provide such services or training of disaster workers, to victims of major disasters in order to relieve mental health problems caused or aggravated by such major disaster or its aftermath.

42 USC 5183.

COMMUNITY DISASTER LOANS

Loans to local governments.
42 USC 5184.

Repayment.

31 USC 1261
and note.

31 USC 1264.

Ante, p. 146.

Effective date.
31 USC 1264
note.

42 USC 5185.

42 USC 5186.

42 USC 5187.

Cost-sharing.
42 USC 5188.

SEC. 414. (a) The President is authorized to make loans to any local government which may suffer a substantial loss of tax and other revenues as a result of a major disaster, and has demonstrated a need for financial assistance in order to perform its governmental functions. The amount of any such loan shall be based on need, and shall not exceed 25 per centum of the annual operating budget of that local government for the fiscal year in which the major disaster occurs. Repayment of all or any part of such loan to the extent that revenues of the local government during the three full fiscal year period following the major disaster are insufficient to meet the operating budget of the local government, including additional disaster-related expenses of a municipal operation character shall be cancelled.

(b) Any loans made under this section shall not reduce or otherwise affect any grants or other assistance under this Act.

(c) (1) Subtitle C of title I of the State and Local Fiscal Assistance Act of 1972 (P.L. 92-512; 86 Stat. 919) is amended by adding at the end thereof the following new section:

"SEC. 145. ENTITLEMENT FACTORS AFFECTED BY MAJOR DISASTERS."

"In the administration of this title the Secretary shall disregard any change in data used in determining the entitlement of a State government or a unit of local government for a period of 60 months if that change—

"(1) results from a major disaster determined by the President under section 301 of the Disaster Relief Act of 1974, and

"(2) reduces the amount of the entitlement of that State government or unit of local government."

(2) The amendment made by this section takes effect on April 1, 1974.

EMERGENCY COMMUNICATIONS

SEC. 415. The President is authorized during, or in anticipation of, an emergency or major disaster to establish temporary communications systems and to make such communications available to State and local government officials and other persons as he deems appropriate.

EMERGENCY PUBLIC TRANSPORTATION

SEC. 416. The President is authorized to provide temporary public transportation service in an area affected by a major disaster to meet emergency needs and to provide transportation to governmental offices, supply centers, stores, post offices, schools, major employment centers, and such other places as may be necessary in order to enable the community to resume its normal pattern of life as soon as possible.

FIRE SUPPRESSION GRANTS

SEC. 417. The President is authorized to provide assistance, including grants, equipment, supplies, and personnel, to any State for the suppression of any fire on publicly or privately owned forest or grassland which threatens such destruction as would constitute a major disaster.

TIMBER SALE CONTRACTS

SEC. 418. (a) Where an existing timber sale contract between the Secretary of Agriculture or the Secretary of the Interior and a timber

purchaser does not provide relief from major physical change not due to negligence of the purchaser prior to approval of construction of any section of specified road or of any other specified development facility and, as a result of a major disaster, a major physical change results in additional construction work in connection with such road or facility by such purchaser with an estimated cost, as determined by the appropriate Secretary, (1) of more than \$1,000 for sales under one million board feet, (2) of more than \$1 per thousand board feet for sales of one to three million board feet, or (3) of more than \$3,000 for sales over three million board feet, such increased construction cost shall be borne by the United States.

(b) If the appropriate Secretary determines that damages are so great that restoration, reconstruction, or construction is not practical under the cost-sharing arrangement authorized by subsection (a) of this section, he may allow cancellation of a contract entered into by his Department notwithstanding contrary provisions therein.

Contract cancellation.

(c) The Secretary of Agriculture is authorized to reduce to seven days the minimum period of advance public notice required by the first section of the Act of June 4, 1897 (16 U.S.C. 476), in connection with the sale of timber from national forests, whenever the Secretary determines that (1) the sale of such timber will assist in the construction of any area of a State damaged by a major disaster, (2) the sale of such timber will assist in sustaining the economy of such area, or (3) the sale of such timber is necessary to salvage the value of timber damaged in such major disaster or to protect undamaged timber.

Sale of timber, notice.

(d) The President, when he determines it to be in the public interest, is authorized to make grants to any State or local government for the purpose of removing from privately owned lands timber damaged as a result of a major disaster, and such State or local government is authorized upon application, to make payments out of such grants to any person for reimbursement of expenses actually incurred by such person in the removal of damaged timber, not to exceed the amount that such expenses exceed the salvage value of such timber.

IN-LIEU CONTRIBUTION

SEC. 419. In any case in which the Federal estimate of the total cost of (1) repairing, restoring, reconstructing, or replacing, under section 402, all damaged or destroyed public facilities owned by a State or local government within its jurisdiction, and (2) emergency assistance under section 306 and debris removed under section 403, is less than \$25,000, then on application of a State or local government, the President is authorized to make a contribution to such State or local government under the provisions of this section in lieu of any contribution to such State or local government under section 306, 402, or 403. Such contribution shall be based on 100 per centum of such total estimated cost, which may be expended either to repair, restore, reconstruct, or replace all such damaged or destroyed public facilities, to repair, restore, reconstruct, or replace certain selected damaged or destroyed public facilities, to construct new public facilities which the State or local government determines to be necessary to meet its needs for governmental services and functions in the disaster-affected area, or to undertake disaster work as authorized in section 306 or 403. The cost of repairing, restoring, reconstructing, or replacing damaged or destroyed public facilities shall be estimated on the basis of the design of each such facility as it existed immediately prior to such disaster and in conformity with current applicable codes, specifications and standards.

42 USC 5189.

TITLE V—ECONOMIC RECOVERY FOR DISASTER AREAS

AMENDMENT TO PUBLIC WORKS AND ECONOMIC DEVELOPMENT ACT OF 1965

^{42 USC 3121}
note.

SEC. 501. The Public Works and Economic Development Act of 1965, as amended, is amended by adding at the end thereof the following new title:

"TITLE VIII—ECONOMIC RECOVERY FOR DISASTER AREAS

"PURPOSE OF TITLE

^{42 USC 3231.}

"SEC. 801. (a) It is the purpose of this title to provide assistance for the economic recovery, after the period of emergency aid and replacement of essential facilities and services, of any major disaster area which has suffered a dislocation of its economy of sufficient severity to require (1) assistance in planning for development to replace that lost in the major disaster; (2) continued coordination of assistance available under Federal-aid programs; and (3) continued assistance toward the restoration of the employment base.

^{"Major disaster."}
Ante, p. 143.

"(b) As used in this title, the term 'major disaster' means a major disaster declared by the President in accordance with the Disaster Relief Act of 1974.

"DISASTER RECOVERY PLANNING

^{Recovery Plan-}
^{ning Council,}
^{designation.}
^{42 USC 3232.}

Membership.

^{42 USC 3181.}
^{40 USC app. 1.}

^{42 USC 3161.}
^{40 USC app.}
^{301.}

"SEC. 802. (a) (1) In the case of any area affected by a major disaster the Governor may request the President for assistance under this title. The Governor, within thirty days after authorization of such assistance by the President, shall designate a Recovery Planning Council for such area or for each part thereof.

"(2) Such Recovery Planning Council shall be composed of not less than five members, a majority of whom shall be local elected officials of political subdivisions within the affected areas, at least one representative of the State, and a representative of the Federal Government appointed by the President in accordance with paragraph (3) of this subsection. During the major disaster, the Federal coordinating officer shall also serve on the Recovery Planning Council.

"(3) The Federal representative on such Recovery Planning Council may be the Chairman of the Federal Regional Council for the affected area, or a member of the Federal Regional Council designated by the Chairman of such Regional Council. The Federal representative on such Recovery Planning Council may be the Federal Cochairman of the Regional Commission established pursuant to title V of this Act, or the Appalachian Regional Development Act of 1965, or his designee, where all of the area affected by a major disaster is within the boundaries of such Commission.

"(4) The Governor may designate an existing multijurisdictional organization as the Recovery Planning Council where such organization complies with paragraph (2) of this subsection with the addition of State and Federal representatives except that if all or part of an area affected by a major disaster is within the jurisdiction of an existing multijurisdictional organization established under title IV of this Act or title III of the Appalachian Regional Development Act of 1965, such organization, with the addition of State and Federal representatives in accordance with paragraph (2) of this subsection, shall be designated by the Governor as the Recovery Planning Council. In

any case in which such title III or IV organization is designated as the Recovery Planning Council under this paragraph, some local elected officials of political subdivisions within the affected areas must be appointed to serve on such Recovery Planning Council. Where possible, the organization designated as the Recovery Planning Council shall be or shall be subsequently designated as the appropriate agency required by section 204 of the Demonstration Cities and Metropolitan Development Act of 1966 (42 U.S.C. 3334) and by the Intergovernmental Cooperation Act of 1968 (P.L. 90-577; 82 Stat. 1098).

^{40 USC app.}
301, 401.

“(5) The Recovery Planning Council shall include private citizens as members to the extent feasible, and shall provide for and encourage public participation in its deliberations and decisions.

^{42 USC 4201}
note.

“(b) The Recovery Planning Council (1) shall review existing plans for the affected area; and (2) may recommend to the Governor and responsible local governments such revisions as it determines necessary for the economic recovery of the area, including the development of new plans and the preparation of a recovery investment plan for the 5-year period following the declaration of the major disaster. The Recovery Planning Council shall accept as one element of the recovery investment plans determinations made under section 402(f) of the Disaster Relief Act of 1974.

Review.

“(c)(1) A recovery investment plan prepared by a Recovery Planning Council may recommend the revision, deletion, reprogramming, or additional approval of Federal-aid projects and programs within the area—

Ante, p. 153.
Recovery in-
vestment plan.

“(A) for which application has been made but approval not yet granted;

“(B) for which funds have been obligated or approval granted but construction not yet begun;

“(C) for which funds have been or are scheduled to be apportioned within the five years after the declaration of the disaster;

“(D) which may otherwise be available to the area under any State schedule or revised State schedule of priorities; or

“(E) which may reasonably be anticipated as becoming available under existing programs.

Reserve funds.

“(2) Upon the recommendation of the Recovery Planning Council and the request of the Governor, any funds for projects or programs identified pursuant to paragraph (1) of this subsection may, to any extent consistent with appropriation Acts, be placed in reserve by the responsible Federal agency for use in accordance with such recommendations. Upon the request of the Governor and with the concurrence of affected local governments, such funds may be transferred to the Recovery Planning Council to be expended in the implementation of the recovery investment plan, except that no such transfer may be made unless such expenditure is for a project or program for which such funds originally were made available by an appropriation Act.

Transfer of
funds.

“PUBLIC WORKS AND DEVELOPMENT FACILITIES GRANTS AND LOANS

“SEC. 803. (a) The President is authorized to provide funds to any Recovery Planning Council for the implementation of a recovery investment plan by public bodies. Such funds may be used—

42 USC 3233.

“(1) to make loans for the acquisition or development of land and improvements for public works, public service, or development facility usage, including the acquisition or development of parks or open spaces, and the acquisition, construction, rehabilitation, alteration, expansion, or improvement of such facilities, including related machinery and equipment, and

“(2) to make supplementary grants to increase the Federal share for projects for which funds are reserved pursuant to subsection (c)(2) of section 802 of this Act, or other Federal-aid projects in the affected area.

“(b) Grants and loans under this section may be made to any State, local government, or private or public nonprofit organization representing any area or part thereof affected by a major disaster.

“(c) No supplementary grant shall increase the Federal share of the cost of any project to greater than 90 per centum, except in the case of a grant for the benefit of Indians or Alaska Natives, or in the case of any State or local government which the President determines has exhausted its effective taxing and borrowing capacity.

Interest rate.

“(d) Loans under this section shall bear interest at a rate determined by the Secretary of the Treasury taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loans, adjusted to the nearest one-eighth of 1 per centum, less 1 per centum per annum.

“(e) Financial assistance under this title shall not be extended to assist establishments relocating from one area to another or to assist subcontractors whose purpose is to divest, or whose economic success is dependent upon divesting, other contractors or subcontractors of contracts therefore customarily performed by them. Such limitations shall not be construed to prohibit assistance for the expansion of an existing business entity through the establishment of a new branch, affiliate, or subsidiary of such entity if the Secretary of Commerce finds that the establishment of such branch, affiliate, or subsidiary will not result in an increase in unemployment of the area of original location or in any other area where such entity conducts business operations, unless the Secretary has reason to believe that such branch, affiliate, or subsidiary is being established with the intention of closing down the operations of the existing business entity in the area of its original location or in any other area where it conducts such operations.

“LOAN GUARANTEES

42 USC 3234.

Limitation.

“SEC. 804. The President is authorized to provide funds to Recovery Planning Councils to guarantee loans made to private borrowers by private lending institutions (1) to aid in financing any project within an area affected by a major disaster for the purchase or development of land and facilities (including machinery and equipment) for industrial or commercial usage including the construction of new buildings, and rehabilitation of abandoned or unoccupied buildings, and the alteration, conversion, or enlargement of existing buildings; and (2) for working capital in connection with projects in areas assisted under paragraph (1), upon application of such institution and upon such terms and conditions as the President may prescribe. No such guarantee shall at any time exceed 90 per centum of the amount of the outstanding unpaid balance of such loan.

“TECHNICAL ASSISTANCE

42 USC 3235.

“SEC. 805. (a) In carrying out the purposes of this title the President is authorized to provide technical assistance which would be useful in facilitating economic recovery in areas affected by major disasters. Such assistance shall include project planning and feasibility studies, management and operational assistance, and studies evaluating the needs of, and developing potentialities for, economic recovery

of such areas. Such assistance may be provided by the President directly, through the payment of funds authorized for this title to other departments or agencies of the Federal Government, through the employment of private individuals, partnerships, firms, corporations, or suitable institutions, under contracts entered into for such purposes, or through grants-in-aid to appropriate public or private nonprofit State, area, district, or local organizations.

(b) The President is authorized to make grants to defray not to exceed 75 per centum of the administrative expenses of Recovery Planning Councils designated pursuant to section 802 of this Act. In determining the amount of the non-Federal share of such costs or expenses, the President shall give due consideration to all contributions both in cash and in kind, fairly evaluated, including but not limited to space, equipment, and services. Where practicable, grants-in-aid authorized under this subsection shall be used in conjunction with other available planning grants, to assure adequate and effective planning and economical use of funds.

Grants for
administrative
expenses.

"AUTHORIZATION OF APPROPRIATIONS

"SEC. 806. There is authorized to be appropriated not to exceed \$250,000,000 to carry out this title."

42 USC 3236.

TITLE VI—MISCELLANEOUS

AUTHORITY TO PRESCRIBE RULES

SEC. 601. The President may prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this Act, and he may exercise any power or authority conferred on him by any section of this Act either directly or through such Federal agency or agencies as he may designate.

42 USC 5201.

TECHNICAL AMENDMENTS

SEC. 602. (a) Section 701(a)(3)(B)(ii) of the Housing Act of 1954 (40 U.S.C. 461(a)(3)(B)(ii)) is amended to read as follows: "(ii) have suffered substantial damage as a result of a major disaster as declared by the President pursuant to the Disaster Relief Act of 1974;".

(b) Section 8(b)(2) of the National Housing Act (12 U.S.C. 1706c(b)(2)) is amended by striking out of the last proviso "section 102(1) of the Disaster Relief Act of 1970" and inserting in lieu thereof "sections 102(2) and 301 of the Disaster Relief Act of 1974".

(c) Section 203(h) of the National Housing Act (12 U.S.C. 1709(h)) is amended by striking out "section 102(1) of the Disaster Relief Act of 1970" and inserting in lieu thereof "sections 102(2) and 301 of the Disaster Relief Act of 1974".

(d) Section 221(f) of the National Housing Act (12 U.S.C. 17151(f)) is amended by striking out of the last paragraph "the Disaster Relief Act of 1970" and inserting in lieu thereof "the Disaster Relief Act of 1974".

(e) Section 7(a)(1)(A) of the Act of September 30, 1950 (Public Law 874, Eighty-first Congress, as amended; 20 U.S.C. 241-1(a)(1)(A)), is amended by striking out "pursuant to section 102(1) of the Disaster Relief Act of 1970" and inserting in lieu thereof "pursuant to sections 102(2) and 301 of the Disaster Relief Act of 1974".

*Ante, pp. 144,
146.*

*Ante, pp. 144,
146.*

(f) Section 16(a) of the Act of September 23, 1950 (79 Stat. 1158; 20 U.S.C. 646(a)) is amended by striking out "section 102(1) of the Disaster Relief Act of 1970" and inserting in lieu thereof "sections 102(2) and 301 of the Disaster Relief Act of 1974".

(g) Section 408(a) of the Higher Education Facilities Act of 1963 (20 U.S.C. 758(a)) is amended by striking out "section 102(1) of the Disaster Relief Act of 1970" and inserting in lieu thereof "sections 102(2) and 301 of the Disaster Relief Act of 1974".

(h) Section 165(h) of the Internal Revenue Code of 1954, relating to disaster losses (26 U.S.C. 165(h)) is amended by striking out "1970" and inserting in lieu thereof "1974".

(i) Section 5064(a) of the Internal Revenue Code of 1954 (26 U.S.C. 5064(a)), relating to losses caused by disaster, is amended by striking out "the Disaster Relief Act of 1970" and inserting in lieu thereof "the Disaster Relief Act of 1974".

(j) Section 5708(a) of the Internal Revenue Code of 1954 (26 U.S.C. 5708(a)), relating to losses caused by disaster, is amended by striking out "the Disaster Relief Act of 1970" and inserting in lieu thereof "the Disaster Relief Act of 1974".

(k) Section 3 of the Act of June 30, 1954 (68 Stat. 330, as amended by 82 Stat. 1213; 48 U.S.C. 1681 nt.), is amended by striking out of the last sentence "section 102(1) of the Disaster Relief Act of 1970" and inserting in lieu thereof "sections 102(2) and 301 of the Disaster Relief Act of 1974".

(l) Section 1820(f) of title 38, United States Code, is amended by striking "the Disaster Assistance Act of 1970" and inserting in lieu thereof "the Disaster Relief Act of 1974".

(m) Whenever reference is made in any provision of law (other than this Act), regulation, rule, record, or document of the United States to provisions of the Disaster Relief Act of 1970 (84 Stat. 1744), repealed by this Act such reference shall be deemed to be a reference to the appropriate provision of this Act.

*42 USC 4401
note.*

*42 USC 4451;
38 USC 1820;
42 USC 4453-
4456.
42 USC 4401
notes, 4434 note.*

REPEAL OF EXISTING LAW

SEC. 603. The Disaster Relief Act of 1970, as amended (84 Stat. 1744), is hereby repealed, except sections 231, 233, 234, 235, 236, 237, 301, 302, 303, and 304. Notwithstanding such repeal the provisions of the Disaster Relief Act of 1970 shall continue in effect with respect to any major disaster declared prior to the enactment of this Act.

PRIOR ALLOCATION OF FUNDS

SEC. 604. Funds heretofore appropriated and available under Public Laws 91-606, as amended, and 92-385 shall continue to be available for the purpose of providing assistance under those Acts as well as for the purposes of this Act.

*42 USC 4401
note.
86 Stat. 554.*

EFFECTIVE DATE

*42 USC 5121
note.*

SEC. 605. Except for section 408, this Act shall take effect as of April 1, 1974.

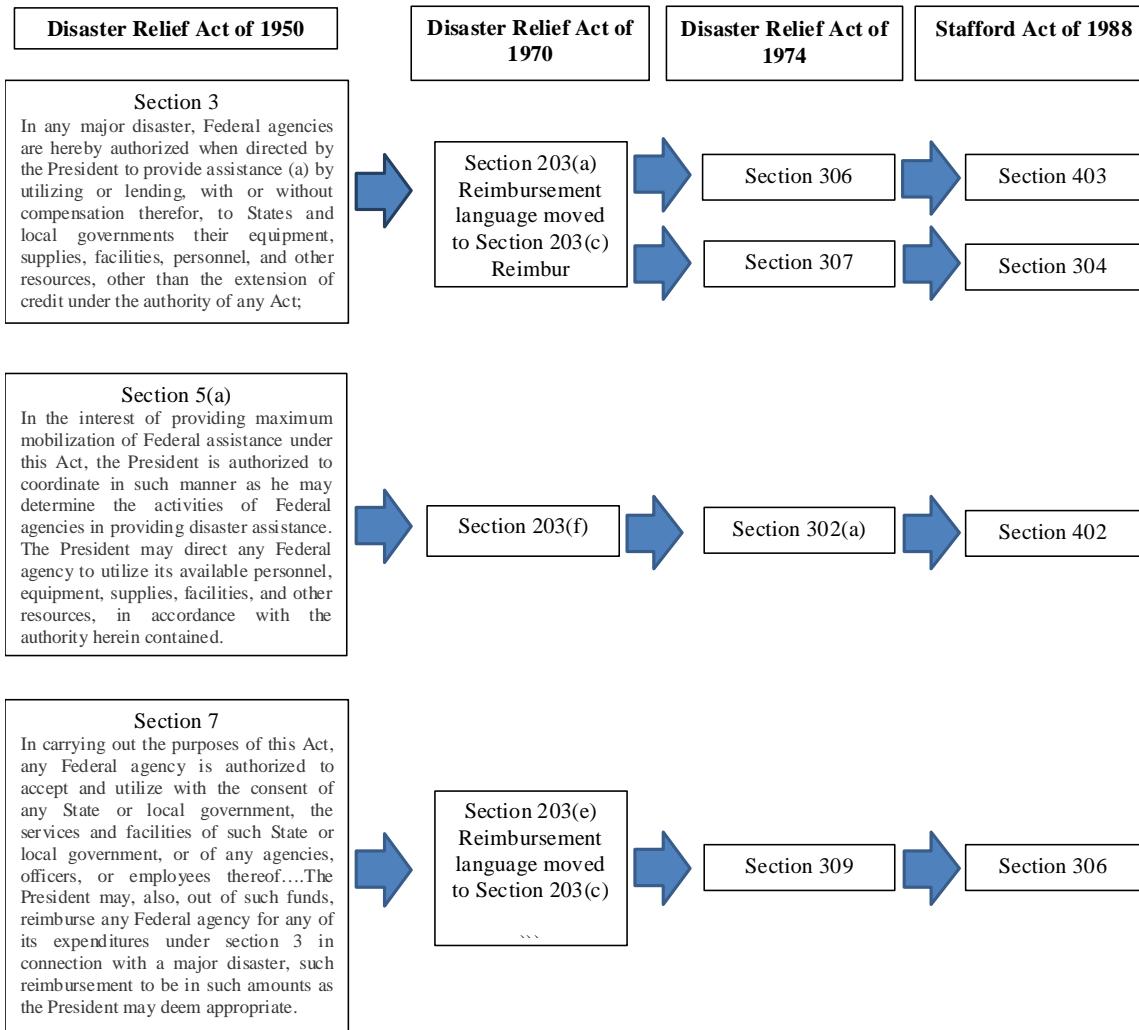
AUTHORIZATION OF APPROPRIATIONS

42 USC 5202.

SEC. 606. Except as provided by the amendment made by section 501, there are authorized to be appropriated to the President such sums as may be necessary to carry out this Act through the close of June 30, 1977.

Approved May 22, 1974.

**APPENDIX E. HISTORY OF MISSION
ASSIGNMENT/PRESIDENTIAL COORDINATION AND
DIRECTION STATUTES FROM THE DISASTER RELIEF ACT OF
1950 THROUGH THE STAFFORD ACT**



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**APPENDIX F. EXCERPT ON FEMA'S RESPONSE
COORDINATION STRUCTURES 1979–1992 FROM THE FEMA
INSPECTOR GENERAL REPORT FEDERAL RESPONSE
PLANNING AND COORDINATION, SEPTEMBER 1992**

An additional challenge has been the requirement for FEMA to coordinate with other Federal agencies as they respond to domestic and national security emergencies. One of the first attempts to meet these challenges was initiated in 1980, with the Interagency Emergency Policy Board. This concept attempted to pull together human resources from across FEMA's organizational boundaries to meet specific crisis requirements. Similarly, interagency staff were to serve as a central government-wide policy making body. The historical record is unclear, but it appears this concept was never tested nor did it survive the change in administrations.

In 1982, FEMA developed the Integrated Emergency Management System Concept (IEMS). This concept for the first time aligned mitigation, planning and response initiatives as a coherent approach to emergency management. While not an organizational initiative, it influenced the way FEMA thought about its organization, and soon after, FEMA management reorganized and established the Emergency Operations Directorate. The directorate's primary objective at the time was to ensure a coordinated FEMA response under one directorate and through this, eliminate replication of planning and response operations in each FEMA program office. Subsequently, in 1984, the results of a report commissioned by FEMA became available. The report, entitled "FEMA's Response in Emergency operations", concluded that "the agency currently has no means for assuring an integrated and coordinated response in extraordinary situations or larger scale, multi-faceted emergencies." The report went on to recommend adoption of a concept named the Integrated Emergency Coordination Structure (IECS). Although this concept is no longer officially recognized, key elements of the concept endure, among them the Director's Emergency Council (DEC), Emergency Response Teams (ERT) and the Emergency Support Teams (EST).

While internal emergency organizational efforts continued, another effort sought to facilitate FEMA's external emergency coordination plans and processes. In 1987, the president's Domestic Policy Council (DPC) concluded that a "generic interagency structure would provide a more efficient and effective means of coordinating Federal emergency responses than would multiple plans with different organizing principles." The DPC's proposed solution was entitled National Emergency Response Structure (NERS). The key feature was a consistent set of organizational principles and procedures for all response agencies to use in both domestic and national security emergencies. Significantly, the concept provided interagency coordination channels and links to the Chief Executive through an interagency council and a "national coordinating official" appointed by the president. Response operations would be conducted through a "lead federal agency concept" and inter-agency functional groups. This "functional group concept" exists today in both our domestic and national security plans.

In January 1988, the NERS Concept was re-titled the National System for Emergency Coordination (NSEC) and approved by the president. In communicating the decision to the Domestic Policy council, the approval specifically stated that NSEC was a means for "ensuring that the Federal Government provided timely, effective and coordinated assistance to state and local governments in extreme catastrophic technological, natural or other domestic disasters of national significance." The concept clearly provided for a command relationship between the Executive Office of the president and other federal agencies through an appointed national coordinating official. Significantly, NSEC cites the Plan for Federal Response to a Catastrophic Earthquake, which is now named the Federal Response Plan (FRP), and acknowledges it as the key plan through which assistance gets funneled to State and local governments. Concurrent with this action in June 1988, then Assistant to the President for National Security Affairs, General Colin L. Powell, instructed agencies to develop a National Security Plan with a "functionally" oriented structure as a companion approach for national security emergencies. This, he concluded, "will assure a consistent response by the Federal Government regardless of the nature of an emergency and will eliminate the need to change response mechanisms in the midst of a crisis."

Today, the NSEC concept is still included in official documents and many of the planning tenets still endure, although the concept has been disregarded by many agencies, including FEMA. However, the Environmental Protection Agency, Department of Energy, and the Nuclear Regulatory Commission still include NSEC as a planning assumption and acknowledge its relevance to their response plans, i.e., the National Contingency Plan for oil and Hazardous Substance Pollution (NCP) and the Federal Radiological Emergency Response Plan (FRERP).

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APPENDIX G. FEMA'S BASELINE AUTHORITY UNDER PKEMRA (6 U.S.C. §§ 313-314)

Sec. 503. Federal Emergency Management Agency (6 U.S.C. § 313)

(a) In General—There is in the Department the Federal Emergency Management Agency, headed by an Administrator.

(b) Mission—

(1) PRIMARY MISSION—The primary mission of the Agency is to reduce the loss of life and property and protect the Nation from all hazards, including natural disasters, acts of terrorism, and other man-made disasters, by leading and supporting the Nation in a risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation.

(2) SPECIFIC ACTIVITIES—In support of the primary mission of the Agency, the Administrator shall—

(A) lead the Nation's efforts to prepare for, protect against, respond to, recover from, and mitigate against the risk of natural disasters, acts of terrorism, and other man-made disasters, including catastrophic incidents;

(B) partner with State, local, and tribal governments and emergency response providers, with other Federal agencies, with the private sector, and with nongovernmental organizations to build a national system of emergency management that can effectively and efficiently utilize the full measure of the Nation's resources to respond to natural disasters, acts of terrorism, and other man-made disasters, including catastrophic incidents;

(C) develop a Federal response capability that, when necessary and appropriate, can act effectively and rapidly to deliver assistance essential to saving lives or protecting or preserving property or public health and safety in a natural disaster, act of terrorism, or other man-made disaster;

(D) integrate the Agency's emergency preparedness, protection, response, recovery, and mitigation responsibilities to confront effectively the challenges of a natural disaster, act of terrorism, or other man-made disaster;

(E) develop and maintain robust Regional Offices that will work with State, local, and tribal governments, emergency response providers, and other appropriate entities to identify and address regional priorities;

(F) under the leadership of the Secretary, coordinate with the Commandant of the Coast Guard, the Director of Customs and Border Protection, the Director of Immigration and Customs Enforcement, the National Operations Center, and other agencies and offices in the Department to take full advantage of the substantial range of resources in the Department;

(G) provide funding, training, exercises, technical assistance, planning, and other assistance to build tribal, local, State, regional, and national capabilities (including communications capabilities), necessary to respond to a natural disaster, act of terrorism, or other man-made disaster; and

(H) develop and coordinate the implementation of a risk-based, all-hazards strategy for preparedness that builds those common capabilities necessary to respond to natural disasters, acts of terrorism, and other man-made disasters while also building the unique capabilities necessary to respond to specific types of incidents that pose the greatest risk to our Nation.

(c) Administrator—

(1) IN GENERAL—The Administrator shall be appointed by the President, by and with the advice and consent of the Senate.

(2) QUALIFICATIONS—The Administrator shall be appointed from among individuals who have—

(A) a demonstrated ability in and knowledge of emergency management and homeland security; and

(B) not less than 5 years of executive leadership and management experience in the public or private sector.

(3) REPORTING—The Administrator shall report to the Secretary, without being required to report through any other official of the Department.

(4) PRINCIPAL ADVISOR ON EMERGENCY MANAGEMENT—

(A) IN GENERAL—The Administrator is the principal advisor to the President, the Homeland Security Council, and the Secretary for all matters relating to emergency management in the United States.

(B) ADVICE AND RECOMMENDATIONS—

(i) IN GENERAL—In presenting advice with respect to any matter to the President, the Homeland Security Council, or the Secretary, the Administrator shall, as the Administrator considers appropriate, inform the President, the Homeland Security Council, or the Secretary, as the case may be, of the range of emergency preparedness, protection, response, recovery, and mitigation options with respect to that matter.

(ii) ADVICE ON REQUEST—The Administrator, as the principal advisor on emergency management, shall provide advice to the President, the Homeland Security Council, or the Secretary on a particular matter when the President, the Homeland Security Council, or the Secretary requests such advice.

(iii) RECOMMENDATIONS TO CONGRESS—After informing the Secretary, the Administrator may make such recommendations to Congress relating to emergency management as the Administrator considers appropriate.

(5) CABINET STATUS—

(A) IN GENERAL—The President may designate the Administrator to serve as a member of the Cabinet in the event of natural disasters, acts of terrorism, or other man-made disasters.

(B) RETENTION OF AUTHORITY—Nothing in this paragraph shall be construed as affecting the authority of the Secretary under this Act.

Sec. 504. Authority and Responsibilities (6 U.S.C. § 314)

(a) In General —The Administrator shall provide Federal leadership necessary to prepare for, protect against, respond to, recover from, or mitigate against a natural disaster, act of terrorism, or other man-made disaster, including—

(1) helping to ensure the effectiveness of emergency response providers to terrorist attacks, major disasters, and other emergencies;

(2) with respect to the Nuclear Incident Response Team (regardless of whether it is operating as an organizational unit of the Department pursuant to this subchapter)—

(A) establishing standards and certifying when those standards have been met;

(B) conducting joint and other exercises and training and evaluating performance; and

(C) providing funds to the Department of Energy and the Environmental Protection Agency, as appropriate, for homeland security planning, exercises and training, and equipment;

(3) providing the Federal Government's response to terrorist attacks and major disasters, including—

(A) managing such response;

(B) directing the Domestic Emergency Support Team, the National Disaster Medical System, and (when operating as an organizational unit of the Department pursuant to this subchapter) the Nuclear Incident Response Team;

(C) overseeing the Metropolitan Medical Response System; and

(D) coordinating other Federal response resources, including requiring deployment of the Strategic National Stockpile, in the event of a terrorist attack or major disaster;

(4) aiding the recovery from terrorist attacks and major disasters;

(5) building a comprehensive national incident management system with Federal, State, and local government personnel, agencies, and authorities, to respond to such attacks and disasters;

(6) consolidating existing Federal Government emergency response plans into a single, coordinated national response plan;

- (7) helping ensure the acquisition of operable and interoperable communications capabilities by Federal, State, local, and tribal governments and emergency response providers;
- (8) assisting the President in carrying out the functions under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) and carrying out all functions and authorities given to the Administrator under that Act;
- (9) carrying out the mission of the Agency to reduce the loss of life and property and protect the Nation from all hazards by leading and supporting the Nation in a risk-based, comprehensive emergency management system of—
 - (A) mitigation, by taking sustained actions to reduce or eliminate long-term risks to people and property from hazards and their effects;
 - (B) preparedness, by planning, training, and building the emergency management profession to prepare effectively for, mitigate against, respond to, and recover from any hazard;
 - (C) response, by conducting emergency operations to save lives and property through positioning emergency equipment, personnel, and supplies, through evacuating potential victims, through providing food, water, shelter, and medical care to those in need, and through restoring critical public services; and
 - (D) recovery, by rebuilding communities so individuals, businesses, and governments can function on their own, return to normal life, and protect against future hazards;
- (10) increasing efficiencies, by coordinating efforts relating to preparedness, protection, response, recovery, and mitigation;
- (11) helping to ensure the effectiveness of emergency response providers in responding to a natural disaster, act of terrorism, or other man-made disaster;
- (12) supervising grant programs administered by the Agency;
- (13) administering and ensuring the implementation of the National Response Plan, including coordinating and ensuring the readiness of each emergency support function under the National Response Plan;
- (14) coordinating with the National Advisory Council established under section 508;
- (15) preparing and implementing the plans and programs of the Federal Government for—
 - (A) continuity of operations;
 - (B) continuity of government; and
 - (C) continuity of plans;
- (16) minimizing, to the extent practicable, overlapping planning and reporting requirements applicable to State, local, and tribal governments and the private sector;

- (17) maintaining and operating within the Agency the National Response Coordination Center or its successor;
 - (18) developing a national emergency management system that is capable of preparing for, protecting against, responding to, recovering from, and mitigating against catastrophic incidents;
 - (19) assisting the President in carrying out the functions under the national preparedness goal and the national preparedness system and carrying out all functions and authorities of the Administrator under the national preparedness System;
 - (20) carrying out all authorities of the Federal Emergency Management Agency and the Directorate of Preparedness of the Department as transferred under section 505; and
 - (21) otherwise carrying out the mission of the Agency as described in section 503(b).
- (b) All-Hazards Approach—In carrying out the responsibilities under this section, the Administrator shall coordinate the implementation of a risk-based, all-hazards strategy that builds those common capabilities necessary to prepare for, protect against, respond to, recover from, or mitigate against natural disasters, acts of terrorism, and other man-made disasters, while also building the unique capabilities necessary to prepare for, protect against, respond to, recover from, or mitigate against the risks of specific types of incidents that pose the greatest risk to the Nation.

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**APPENDIX H. STATEMENT BY SENATOR TRENT LOTT BEFORE
THE UNITED STATE SENATE, JULY 11, 2006 152 CONG REC S
7306 VOL 152, NO. 89, JULY 11, 2006, PGS 7318-7319.**

Amendment No. 4560

Mr. LOTT. Mr. President, I come to the floor to join in the support of amendment No. 4560 to the Department of Homeland Security appropriations bill. I thank Senator Collins for her leadership in this area and for her willingness to work on a solution that I think will be good for the Federal Emergency Management Administration, as it is now known, in the Department of Homeland Security, and result in a better effort by the successor to FEMA in the future.

Let me begin by saying that I appreciate the support of my colleagues in the Senate as we have gone through the aftermath of Katrina and we have come to the floor three or four times asking for help in a variety of areas to help us with the recovery, to get funds for the different Federal agencies, to get funds even to the Federal Emergency Management Administration to help us recover. A lot of progress has been made. I want to acknowledge that.

In 3 years or 5 years, we are going to look back and say that the aid we received from the Federal Government was absolutely indispensable and allowed us to get through this very difficult process.

In the immediate aftermath of the hurricane, there were wonderful stories that could be told about the actions of the Coast Guard specifically, let me point out, and by other military installations, faith-based groups, volunteer groups, charitable organizations, by corporate America that sent aid, supplies, money, people. The utilities worked laboriously to get power back on and telephones operative. It was a monumental undertaking.

For those who want to be critical of the recovery effort-and I am one of those-you have to first acknowledge that this was a devastating disaster of Biblical proportions, more than any of us could have comprehended, more than any of us who lived in the line of fire from Hurricane Katrina understood even in the immediate aftermath, including me.

I was there in the immediate aftermath. We lost our house. We are like everybody else along the coastline of Mississippi and Louisiana. It is a very difficult experience. But our people have been resilient, they have been determined, and we are making progress.

We did get through the preparations for the hurricane, saving lives immediately after, getting basics to people who needed them-just basic water and ice. We have gotten almost all of the debris removed, except in some of the swamp and water canals and channels that still has to be removed. We are seeing rebuilding start. Just yesterday, the Department of Housing and Urban Development released \$3 billion for the home grants through CDBG so that people who lost their home, had no insurance, and had a mortgage and probably lost their job and their car, their truck, or their dog will have some way to

get up to \$150,000 to get their homes repaired or rebuilt. So we have made a lot of progress.

I think it is time that we look even more to the future: How are we going to get through the rebuilding period? We are working with elevations, heights that FEMA is requiring; we are dealing with small business loans, all that goes on with the rebuilding effort.

But I am worried about the next disaster. There were some very disappointing results at FEMA. And I want to hasten to say that FEMA, which became a dirty, four-letter word, has a lot of good people in it and has done a lot of really good things, but it could have been and it should have been better. And what troubles me so much, as a Congressman and Senator and even before that as a staff member-I have dealt with the recovery effort after five hurricanes, two major tornadoes, two major ice storms, and a flood. I have dealt with disasters. I have dealt with the emergency arm of the Federal Government, going back to 1969 after Hurricane Camille, when the disaster effort and recovery was carried out by the Office of Emergency Preparedness, OEP. Its offices are right across the street from the Old Executive Office Building, run by a general, a retired Army general, and reportable only to the President of the United States.

They did a marvelous job after Hurricane Camille. The chain of command was short. In those days, the Corps of Engineers brought in the heavy equipment, the trucks, the bulldozers, the front-end loaders, the Bobcats. They cleaned up the debris. Now you have to go through Treasury, a check goes to FEMA, FEMA goes to the Corps, the Corps of Engineers goes to the contractor-out of State probably-and the contractor goes to subcontractors, to sub-subcontractors and, meanwhile, a lot of money is frittered away as everybody takes their bite, on down the line.

Of course, one of the most difficult things was getting the trailers, the temporary housing to people in the area. The logistics of getting trailers is not a big problem, but getting them to the people turned out to be a huge problem. The insanity of how it was managed was inexplicable. I won't go through how difficult it was.

We are still dealing with that. We still have some people who are living in tents because FEMA said: We won't deliver you a trailer if you are in a flood zone. If that is all the property you have-you could bring a trailer into a flood zone, and if you had to, you could hitch it up and pull it out. But people are still living in very difficult circumstances.

I believe we made a mistake when we were creating this huge, new, mammoth Department of Homeland Security where we put all of these different entities, agencies, and bureaus into that agency that wound up having 150,000 or more people in it.

I remember when we were discussing creating this Department of Homeland Security in an office right down the hall. Senator Stevens and Senator Collins and some of us raised questions about how the Coast Guard was going to be handled, and we wound up carving out a special arrangement for the Coast Guard. I won't get into the details of it at this moment. But I raised questions about FEMA, too: Are we sure we want to put our emergency management organization into this big, mammoth department

and maybe become overrun by homeland security and terrorism? And the answer was: Oh, absolutely. They need to coordinate manmade disasters, natural disasters, disaster preparation, disaster recovery; it needs to be seamless and they all need to be operating under the same authority.

Well, I relented. I think it was a mistake. I think the emergency management organization has a unique responsibility in preparation for disasters. Yes, they can be manmade as well as natural disasters, but also in the recovery. But I think the chain of command was out of control. The number of officials who were meeting in a room, they would fill up the room and identify all the problems: Oh, we have a flood main broken here. We have schools where the wall is falling in. We have debris in the road. They would get through with the meeting, everybody would leave, and somebody would say: Did anybody get any assignments? Did they agree to do anything? No.

The people that did do something, though, were in the Coast Guard. They helped move people out before the hurricane, rescued people during and after the hurricane, and generally did a magnificent job. Do you know why? Because they had this carved-out, unique position, even though they were in the Department of Homeland Security. They didn't have to go through the Secretary of the Department of Homeland Security to do what was necessary.

Another example was the Seabees at Gulfport, MS. When they went to these meetings with all of these muckety-mucks, all of these different agency heads, to hear the problems and do nothing about it, the Seabees would make lists of things they could do and they went out and did it. They went out and stopped the leaky water main. They went and removed the debris so you could get into a neighborhood. They went to the school and they took action to tear down or repair or fix a wall so it would at least be safe for their children. You know what. They just did it.

By the way, they could have gotten in trouble because if FEMA hadn't agreed to reimbursement, they would have had to eat the cost of what they did, and some captain in the Seabees could have been in real jeopardy. But, thank goodness, they worked through it. They got reimbursed and did well.

So I think that is part of the problem. I asked the Seabees: Why were you able to do that?

They said: Well, the chain of command was so long and laborious, we decided we would find the things we could do and we would just go out and do it.

FEMA, I think, meanwhile, had been sort of pushed back into the back 40 part of Homeland Security. They had been underfunded, undermanned, and had not been really getting the involvement and the attention they needed. Plus, I was shocked one time when I heard the Secretary of Homeland Security complaining that the head of FEMA was going around him directly to the President. Yes, he should have. You shouldn't have the emergency management and recovery people having to check with the Assistant Secretary, the Deputy Secretary, the Secretary, the Chief of Staff, the OMB, to get to the President. This is an emergency. It is a disaster, for heaven's sake. So I don't think it worked well.

I don't blame a lot of the good men and women at FEMA; I blame us. We did it. We created a system that didn't work.

So I introduced legislation to move FEMA, like its predecessors, back into a role as an independent agency with specific authorities for natural disasters, reporting only to the President. I was joined in sponsoring that legislation by the Senator from New York, Mrs. Clinton, who knows something about how the predecessor to FEMA worked under its Administrator at the time, James Lee Witt, who also had a little experience with disasters, although the ones he dealt with on 9/11, as the Senator from New York knows, were manmade. Others joined in cosponsoring that legislation.

I still believe that is the best way to go. I think it should be independent.

In the House, you have two separate approaches. You have the independent approach and you have the approach that would keep it locked in Homeland Security. But it seemed to me that there was a third way. There is always a third way, if you will just look for it. I think that is one of the things we have lost in this institution. We get locked into the Republican position, the Democratic position, or some other division, and then we won't talk to each other.

So Senator Collins, to her credit, on her own initiative, said: Can I come talk to you about the proposal that Senator Lieberman and I have, which was to keep it in the Department of Homeland Security, with some changes, and some recommendations I thought would have been positive but still was not the solution I thought we needed. But she came and took the time to explain it to me. It had some attractive features to it. She gave it more authority.

But then I thought about it for a while and I went back to her and I said: Let's find this third way. I think maybe the thing to do is to carve FEMA out into a position like the Coast Guard but within the Department of Homeland Security but with an independent authority, the ability to report directly to the President of the United States. Yes, they could be involved in coordinating and in the preparation for disasters of all kinds, but set them up basically independent within the Department of Homeland Security.

I think it will work. An example is the Coast Guard. So much of the language that we have in this amendment came from the Coast Guard language. I know Senator Collins has taken the time to explain the details of what is proposed here, and I am painting a broader picture of what is involved. But we were able to come to an agreement. Her staff was cooperative. My staff, which has had a lot of experience with this sort of thing, worked with them, and we came to an agreement. By the way, I then went to Senator Clinton and said: I think we can get something done if we do this, rather than just having a big fight. Do you want a big fight or do you want a result? The new hurricane season is upon us.

Now, the media made it sound like on June 8, or whatever the date was that hurricane season begins, we would get hit immediately. Well, those of us who are hurricane pros know that hurricanes generally don't hit in June and July, but they will come in August and September, and this time it may not be Mississippi or Florida; it may be Maine. But it will come somewhere. I don't want to be sitting around here

complaining about what it was like because FEMA did not have the authority they needed, didn't have the money, didn't have the power they needed 6 months or a year from now. So we needed to get something done.

Senator Clinton understood what I was trying to do. It is part of the way I think we need to do things around here. It is part of being honorable with each other. She had been a cosponsor. I thought I should explain what I was working on doing. So we came to the agreement that has been produced with this amendment. I think it makes good sense. I think the House will find some wisdom in it, and the most important thing is we will get something done.

It is so difficult to move something through the Senate anymore. Do you think we could really move a whole new, freestanding bill through the Homeland Security and Government Affairs Committee, get it to the floor of the Senate, all kinds of amendments-and let me tell you, I would be one of the ones waiting here with lots of amendments. I have lots of other things stuck in my craw about the hurricanes that I am worried about for the future-or could we go with an amendment, which seems appropriate to me, to the Department of Homeland Security appropriations bill, get it to the House, get their input, and get a result. Even then, it won't be perfect, but I believe it will be better. This is something we should do.

I will be coming back, until the last day I serve in this institution-whenever that may be-to talk to my colleagues about lessons we learned and things we can do that will hopefully help our people be more secure; that will help people who will be hit with other kinds of disasters such as tornadoes, earthquakes, crickets, or whatever, but we will do it better because of what we learned from Hurricane Katrina.

So I am delighted to be here to support this amendment. In a perfect world I might do it differently, or I might still insist that it can be a separate entity. The amendment even proposes that it be renamed the Emergency Management Administration, I believe-EMA. It is something we can say, and it is not a four-letter word. I think while that is not going to cure a single problem, it is part of creating a new atmosphere and a different mindset, hopefully.

I think the Administrator of FEMA that we have in place now, Mr. Paulson, is a good man. I think he is going to move toward trying to get professional disaster-experienced people in FEMA throughout this country, and I certainly hope he will.

So I urge my colleagues to support this amendment and then support this appropriations bill. I yield the floor.

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